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JUDGES OF THE HIGH COURT.

JANUARY—JUNE, 1939.

Chief Justice.

The Hon'ble Sir Alfred Henry Lionel Leach (*Barrister-at-law*).

Puisne Judges.

The Hon'ble Justice Sir C. Madhavan Nair, *Kt.* (*Barrister-at-law*) (up to 23rd January, 1939).

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THE

Madras Law Journal Reports.

I] JANUARY [1939

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

PRESENT:—LORD WRIGHT, LORD ROMER, LORD PORTER, SIR SHADI LAL AND SIR GEORGE RANKIN.

Kumar Kamalaranjan Roy .. *Appellant**

v.

The Secretary of State .. *Respondent.*

P.C.

Kamalaranjan Roy *v.* Secretary of State.

Bengal Sales of Land for Arrears of Revenue Act (XI of 1859), S. 37—Settlement of estates—Costs—Apportionment among patnidars—Sale of estate for recovery of arrears of land revenue—Annulment of under-tenures by purchaser—Undischarged liability of patnidars for settlement costs—Whether recoverable from purchaser—Bengal Tenancy Act (VIII of 1885), S. 114 (1), (3)—Bengal Public Demands Recovery Act (III of 1913).

Where a purchaser annuls under-tenures under S. 37 of the Bengal Sales of Land for Arrears of Revenue Act of 1859, those under-tenures cease to exist, and therefore all charges on the patnidars' interests similarly cease and determine. Accordingly, assuming an apportionment of settlement expenses on patnidars under S. 114 of the Act of 1885 to be a charge on their estate, those expenses cannot be recovered from the purchaser of the estate who has exercised his right of annulling the under-tenures under S. 37.

The liability imposed by S 114 of the Bengal Tenancy Act of 1885 is, as indicated by the machinery laid down by the section, confined to the specific person against whom the certificate creating the debt imposed by the section is filed. The provisions of the section are inconsistent with a liability shifting from the certificate debtor to any new landlord to whom the estate may pass. The liability imposed by the section is not expressed to be on those who are the landlords and occupiers from time to time as long as any part of the apportioned expenses is outstanding, and accordingly does not, where patnidars have failed to pay their share of the apportionment, pass to the purchaser of an estate who annuls the patni estates which form part of it.

* P. C. Appeal No. 68 of 1937. 17th October, 1938.
Bengal Appeals Nos 32 and 33 of 1936.

P.C.
——.
Kamala-
ranjan Roy
v.
Secretary of
State.

R. 414 of the Bengal Survey and Settlement Manual, 1917, does not purport to deal with a case of the annulment of under-tenures, but only with death, transfer or abandonment, and abandonment does not include annulment. The rule therefore has no application to the case where the purchaser of an estate annuls the under-tenures under S. 37 of the Bengal Sales of Land for Arrears of Revenue Act of 1859 in respect of which settlement costs are still outstanding.

Decision of the Calcutta High Court reversed.

Consolidated appeals from decisions of the High Court, Fort William, Bengal (Surendra Nath Guha and Bartley, JJ.), dated 27th March, 1936, reversing two decrees of the District Judge, Murshidabad, dated 17th July, 1933, reversing two decrees of the Subordinate Judge, Murshidabad, dated 28th February, 1933.

The plaintiff-appellant was the purchaser under the Sales of Land for Arrears of Revenue (Bengal) Act, 1859, of an estate in respect of which settlement operations had been completed shortly beforehand. The expenses of the settlement had been apportioned among zemindars and patnidars, and some of the latter had failed to pay the sums apportioned against them. The purchaser proceeded after purchase to annul the patni estates or under-tenures as he was entitled to do under S. 37 of the Sales of Land for Arrears of Revenue (Bengal) Act, 1859. The Government demanded from the purchaser payment of the sums due in respect of the under-tenures which he had taken over, and he, having paid those sums under protest, brought two actions to recover the different sums so paid. The Subordinate Judge dismissed the actions, but the District Judge reversed that decision. On appeal the High Court reversed the decision of the District Judge, and ordered that the actions should be dismissed. The plaintiff-purchaser now appealed to His Majesty.

A. M. Dunne, K.C., Sir T. J. Strangman and *C. Bagram* for Appellant.—The plaintiff purchased this estate free from all encumbrances. To deal first with the argument under r. 414 of the Bengal Survey and Settlement Manual, 1917; even if that rule has the force of law, and it is submitted that it has not, at any rate in the sense in which it is sought to impute that force to it, it has no application to a case such as the present. The rule refers to the death of a tenant and to the transfer or abandonment of his tenancy. The annulment of his tenancy by a purchaser under S. 37 of the Act of 1859 does not fall into any of those categories and accordingly is not affected by the rule. Moreover, the purchaser does not by carrying out the annulment become a

person in possession of the patnidars' interests. The conditions of the rule are accordingly not satisfied, and it can have no application. S. 114 of the Act of 1885 also does not have the effect of saddling the purchaser with these unpaid costs. Those costs are on the patnidars themselves in respect of the land. They are not a charge on the patnidars' interest in the land, and in any case the purchaser does not come on the scene as being in any sense the successor in interest of the patnidar whose estate has simply been annulled.

J. Millard Tucker, K.C. and *J.M. Pringle* for Respondent.—It is submitted on two main grounds that the appellant-purchaser is liable for the amounts in question. (*a*) The costs of the settlement as apportioned on the patnidars constitute a charge on their interest in their land as distinct from being a charge on them personally. The charge being on the land, and the purchaser being a successor to the patnidars' interest in the land, he becomes liable for the sum which is charged on the patnidars' interest in the land. (*b*) S. 114 of the Act of 1885, on its true construction, provides that the liability for settlement costs shall be, not on any persons who are landlords, tenants, or occupiers at any specified time, but on any persons who are landlords, tenants or occupiers at any time for as long as any part of the settlement costs is still outstanding. The purchaser has become a landlord, tenant or occupier while certain costs apportioned on patnidars whose estates he has annulled are outstanding. He is accordingly within the provisions of the section and is liable for the unsatisfied amounts.

17th October, 1938. Their Lordships' judgment was delivered by

Lord Wright.

LORD WRIGHT.—The appellant in these consolidated appeals is the purchaser of a zemindari estate sold under the provisions of the Sales of Land for Arrears of Revenue (Bengal) Act (XI of 1859) for the recovery of arrears of land revenue. The question is whether he is liable, after he annulled, as he was entitled to do under S. 37 of Act XI of 1859, the under-tenures, for the unpaid balance of the costs of the preparation of a record of rights of the estate, which had been duly apportioned on the patnidars of the estate before the purchase by the appellant of the estate and the annulment of the under-tenures. The appellant was plaintiff in the action; he had paid under protest the amount demanded from him by the Government and was claiming repayment.

P.C.

Kamalaranjan Roy
v.
Secretary of State.

Lord Wright.

The facts are short and not in dispute. The estate in question is in the District of Murshidabad. In 1923 settlement operations were commenced, and these were completed in November, 1928. Thereupon the provisions of S. 114 of the Bengal Tenancy Act, 1885, came into effect. These provisions so far as relevant are as follows:—

"S. 114 (1).—When the preparation of a record-of-rights has been directed or undertaken under this Chapter, in any case except where a settlement of land-revenue is being or is about to be made, the expenses incurred in carrying out the provisions of this Chapter in any local area, estate, tenure or part thereof (including expenses that may be incurred at any time, whether before or after the preparation of the record-of-rights, in the maintenance, repair or restoration of boundary marks and other survey marks erected for the purpose of carrying out the provisions of this Chapter), or such part of those expenses as the Local Government may direct, shall be defrayed by the landlords, tenants and occupants of land in that local area, estate, tenure or part in such proportions and in such instalments (if any), as the Local Government, having regard to all the circumstances, may determine."

* * * *

"(3) The portion of the aforesaid expenses which any person is liable to pay shall be recoverable by the Government as if it were an arrear of land-revenue due in respect of the said local area, estate, tenure or part."

* * * *

The settlement having been completed, the costs, which in the first instance were borne by the Government, were apportioned in accordance with an order of the Governor in Council dated the 12th June, 1928, as between landlords and raiyats, and, in particular, permanent tenure-holders whose rent was fixed in perpetuity were to pay their own share of the costs and that of the landlords superior to them. The patnidars were accordingly liable to pay the whole of the 15 annas per acre share which was apportioned as the liability of the landlords in respect of the total cost of Rs. 1-8 per acre. The raiyats' share was thus 9 annas per acre.

On the 28th March, 1930, the appellant purchased the estate in question, which was No. 7 in the Murshidabad Collectorate, and lay within the limits covered by the record of rights, in a revenue sale held under the provisions of Bengal Act XI of 1859. At that time the patnidars had paid some part of the amounts apportioned on them, but some balances were still unpaid. In respect of these unpaid balances, the certificate procedure under the Bengal Public Demands Recovery Act, 1913, came into force, in particular section 8, which provides that, on the service of notice of a certificate

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under S. 7 of the Act, the certificate debtor is debarred from transferring or delivering any of his immovable property in the district in which the certificate is filed, or any interest in that property, and that the amount due from time to time shall be a charge on the immovable property of the certificate debtor wherever situate, to which any subsequent charge is postponed. It appears and is not contested that certificates complying with the Act were duly signed and filed by the certificate officer in respect of the arrears of the apportioned costs, and notices duly served on the defaulters. The zemindars duly paid such amounts as were apportioned against them.

Thereafter in 1930 the appellant purchased the estate under S. 37 of the Act XI of 1859 which is in the following terms:—

"S. 37.—The purchaser of an entire estate in the permanently settled Districts of Bengal, Behar and Orissa, sold under this Act for the recovery of arrears due on account of the same, shall acquire the estate free from all encumbrances which may have been imposed upon it after the time of settlement; and shall be entitled to avoid and annul all under-tenures and forthwith to eject all under-tenants, with the following exceptions:—"

It has been held by this Board in the case of *Turner Morrison & Co.* v. *Monmohan Chowdhury*[1], that the section distinguishes between incumbrances and under-tenures. Encumbrances are wiped out by the sale; in the case of under-tenures the purchaser is entitled to avoid and annul, and it is only on his doing so that he can eject all under-tenants. In the present case the appellant immediately after the purchase annulled all the under-tenures, that is, the patnis or estates of the patnidars in question, the rights of the raiyats being preserved by the proviso to S. 37. It is not contested that the appellant duly annulled the patnidars' estates, which thereupon became void and ceased to exist.

Thereupon the certificate officer purported to transfer the certificates in regard to the patnidars who were still in default into the name of the appellant, and caused notices and copies of the certificates to be served on the appellant and demanded payment of the amounts from him. He paid under protest and brought the present actions for cancellation of the certificates filed against him, and for the recovery of the amount so paid.

1. (1931) 62 M.L.J. 86: L.R. 58 I.A. 440 (P.C.).

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The Subordinate Judge decided in favour of the respondent. His judgment, which was quite short, proceeded on the footing that, because the appellant was in possession of the lands of the patnidars in respect of which the costs were assessed, he was liable for the costs. In particular he proceeded on r. 414 of the Bengal Survey and Settlement Manual, which is in the following terms:—

"Rule 414.—If before the amounts are collected a landlord or tenant dies or transfers or abandons his estate or tenancy or any part thereof, recovery may be made from the person in possession of the former holder's interest."

On appeal, the District Judge reversed that decision. He held that the terms of r. 414 did not apply to a case of the annulment of the patnidars' estates, the appellant not being in possession as successor in interest of the patnidars but of the zemindar, and also that the assessment was not made on a possession in the land, but upon a person's interest in the land. He held that the appellant was entitled to recover with costs and with interest at 6 per cent. on the decretal amount.

On appeal, that decision was reversed by the High Court, and the suits were dismissed with costs. Their judgment seems to have been based substantially, if not entirely, on the terms of r. 414 of the Manual above referred to; they said, "the conclusion is irresistible that the plaintiff in the case before us having obtained possession of the lands appertaining to the patnis which were annulled by his purchase at a sale for arrears of revenue, was the person from whom the costs of the settlement operations were recoverable."

On the hearing of the appeal before their Lordships, the respondent's counsel have not sought seriously or perhaps at all to uphold the reasons given for deciding in their favour by the Courts below. They have based their right to uphold the judgment below on two grounds which do not appear to have been taken below and which certainly are not discussed by the Subordinate Judge or by the Judges of the High Court. Counsel are unquestionably entitled to uphold a judgment on any proper ground of law, but their Lordships regret that they have to decide on these new submissions without any help from the Judges in India.

As to r. 414 of the Manual which was relied on in the Courts below, it is enough to say on the construction of that rule that it does not purport to deal with a case of the

annulment of under-tenures, but only with death transfer or abandonment. Abandonment cannot, in their Lordships' judgment, be construed as including annulment. If, however, it were so construed, then no statutory authority to justify that provision of the rule has been produced to their Lordships, which provision accordingly would be invalid.

The appeal before their Lordships has been argued on two main alternative bases. One is that the apportionment is a charge on the land or, more accurately, on the patnidars' estate or interest in the land. The other is that the liability imposed under S. 114 is not upon those who are landlords, tenants or occupiers at any specified time but upon those who are landlords, tenants and occupiers from time to time so long as any part of the apportionment is outstanding.

As to the first contention, their Lordships do not think it necessary to decide whether the apportionment constitutes a charge on the patni estate or whether it is an impost on the patnidar in respect of his estate, as has been held by the Indian Courts. They will assume for purposes of this argument, without deciding, that it is a charge on the estate. But when the purchaser, under S. 37, of the entire estate elects to avoid and annul under-tenures, they cease to exist. The power under the section is in the most absolute terms, subject only to the express exceptions set out in the section but these are not material in this case. It seems incontestable in principle that when an interest charged is avoided and determined the charge upon it must also cease and determine. There cannot be a charge upon nothing. The charge depends on the existence of the interest charged, just as an under-lease depends on the head lease and falls when the latter falls or is forfeited. On this ground, the respondent's first contention must fail.

His second contention depends on the construction of S. 114 (1) and (3) of Bengal Tenancy Act. It involves among other difficulties reading into the section words which are not expressed, namely, from time to time. Sub-S. (1) provides for the defrayment of the expenses by the landlords, tenants and occupants of land in that local area, estate, tenure or part in such proportions and in such instalments, if any, as the local Government, having regard to all the circumstances may determine. The machinery for carrying this provision

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into effect has already been described. That machinery includes the issue of a certificate addressed to a particular person, which, whatever else it does, enables execution to be levied against all his immovables wherever situated and establishes a prior charge on these immovables in the relevant district. It also provides for devolution of the liability on his death. Sub-S. (3) of S. 114 provides for recovery by the certificate proceeding as if the debt were an arrear of land revenue. The proceedings so provided for point, in their Lordships' judgment, to the certificate creating a debt as against the specific person against whom the certificate is filed; the debt is to be executed against his estate, with stringent safeguards against his parting with that estate and is to pass on his death. All these provisions seem quite inconsistent with a shifting liability passing from the certificate debtor to any new landlord to whom the estate may pass. The fact seems to be that the various Acts have provided for all contingencies as to transmission and devolution of the estate, but have not provided for the special case in which the patni estate is not transmitted or devolved, but annulled and determined. It may be that there is here a *casus omissus*, but if so that omission can only be supplied by statute or statutory action. The Court cannot put into the Act words which are not expressed, and which cannot reasonably be implied on any recognised principles of construction. That would be a work of legislation, not of construction, and outside the province of the Court. It is said that it is reasonable that the holder of the estate from time to time who gets the benefit of the survey should have to bear the cost till it is entirely discharged and also that in practice this principle has been assumed and acted upon. They may well be so. But the question having been raised must be decided on legal principles and on the relevant statutes. If these do not give any such powers as the respondent claims, the difficulty can only be remedied by a change in the law.

Their Lordships are of opinion that the appeal should be allowed, that the decree of the High Court should be set aside and the decree of the District Judge restored, and that it should be ordered that the respondent pay the appellants' costs of this appeal and in the Courts below.

They will humbly so advise His Majesty.

Solicitors for Appellant: *W. W. Box & Co.*

Solicitors for Respondent: *The Solicitor, India Office.*

R. C. C. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Civil Jurisdiction.]

PRESENT:—MR. JUSTICE GENTLE.

A. Venkatasubbu Mudaliar and another .. *Plaintiffs**

v.

G. Narayanaswami Chetty and others .. *Defendants.*

The Religious Endowments Act (XX of 1863), Ss. 13 and 14—Appointment of interim trustee of a temple—Appointment to last up to an event—Dismissal by committee—Grounds of dismissal should satisfy S. 14—Dismissal without enquiry irregular and opposed to natural justice—Trustee not a servant of the committee—Civil Court itself not empowered to remove trustee without justification—Committee's resolution dismissing trustee and appointing fresh trustee ultra vires.

In a temple to which the provisions of the Religious Endowments Act (XX of 1863) apply, an interim trustee was dismissed by the Devasthanam Committee, at a meeting, on the grounds that the trustee (1) failed to submit a detailed report of the temple leases, amount of arrears of rent and sums collected; (2) prevented members of the Committee from holding their meetings in the temple premises; and (3) broke open hundi boxes without notice to the Committee. At the same meeting the services of the interim trustee, who was originally appointed to hold office till a permanent trustee according to the prevailing custom of the temple from the founder's family was appointed, were terminated and another person was appointed in his place. The dismissed trustee filed the suit and contended that his dismissal was irregular and illegal as he was not guilty of any misconduct, that the appointment of a fresh trustee in his place till a permanent man was appointed was illegal and void, that the resolution of the Committee was *ultra vires* since the agenda did not contain the subject, nor was any notice given to him of the nature of the charges, that he was not afforded an opportunity to defend himself and that therefore an injunction restraining the Committee from interfering with the plaintiffs' possession and management of the temple properties should issue.

Held, (1) that under S. 13 of the Act it is the duty of the trustees to keep accounts of receipts and disbursements and it is the duty of the Committee to require production of the accounts at least once a year. There was no suggestion in the case that the interim trustee had not kept correct accounts. Only if his conduct had amounted to misfeasance, breach of trust or neglect of duty as mentioned in S. 14 of the Act could the Civil Court be empowered to dismiss him. The Committee could not have greater powers than the Court had in regard to the matter. The trustee was not a clerk or a servant of the Committee to be dealt with in any way at their pleasure. The acts complained of by the Committee did not amount to neglect of duty, because the neglect complained of must be of the same seriousness as misfeasance or breach

* C. S. No 217 of 1935. 12th October, 1938.

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of trust. The Committee could not without justification dismiss the trustee from office;

Seshadri Aiyangar v. *Nataraja Aiyar,* (1898) I.L.R. 21 Mad. 179 at 184, followed.

(2) That without proper enquiry into the matter, that is, without charges being framed and an opportunity for explanation being given the trustee to meet the charges, the dismissal was invalid;

Seshadri Aiyangar v. *Nataraja Aiyar,* (1898) I.L.R. 21 Mad. 179 at 219-221; *Ponnambala Pillai* v. *Muthu Chettiar,* (1916) 30 M.L.J. 619 at 621 and *Sundararama Sastri* v. *Anantha Krishna Naidu,* (1916) 5 L.W. 672 at 681, referred.

(3) Notice of the meeting at which enquiry will have to take place should set out the subjects of enquiry in the agenda;

Rama Aiyar v. *Sivagnanam Pillai,* (1927) 54 M.L.J. 140: I.L.R. 51 Mad. 68, relied on.

(4) It was irregular and opposed to natural justice to dismiss the trustee without the necessary requirements of an enquiry;

(5) The trustee, though appointed interim, had what might be called a freehold in his possession since his appointment was up to the event of a permanent holder of the office being found and until that event occurred he was entitled to hold office of a trustee;

(6) That since the dismissal of the interim trustee was irregular and invalid, it would follow that the Committee had no power to appoint any fresh person in his place; and

(7) Hence the Committee should be restrained from interfering with the trustee in his duties as trustee of the temple.

K. Narasimha Aiyar and *V. Ganapati Ayyah* for Plaintiffs.

V. V. Srinivasa Aiyangar, V. C. Gopalaratnam, V. V. Ramadurai, A. Srirangachari and *R. Purushothama Aiyar* for Defendants.

The Court delivered the following

JUDGMENT.—The Sri Kapaliswarar Temple in Mylapore is one to which the provisions of the Hindu Religious Endowments Act (XX of 1863) hereinafter called "the Act" apply, and it is included amongst the temples falling within S. 3 thereof. Defendants 1 to 11 are sued as the members of the Madras Hindu Devasthanam Committee, which Committee is responsible for the superintendence of this, amongst other temples. The plaintiffs were trustees of the temple appointed by the Committee. The second plaintiff was appointed as interim trustee; the 12th defendant was appointed as interim trustee at a meeting of the Committee whereat the second plaintiff was dismissed from his office of interim trustee.

The plaintiffs claim

(1) the following declarations:—

(*a*) that the dismissal of the second plaintiff as interim dharmakarta was irregular and illegal and that he is entitled to continue in his office;

(*b*) that the appointment of the 12th defendant in place of the second plaintiff was illegal and void;

(*c*) that the resolution of the Committee dated 6th May, 1935, relating to the above dismissal and appointment were illegal, *ultra vires* and invalid; and

(2) An injunction restraining the defendants from interfering with the plaintiffs' possession and management of the temple and its properties.

Since the suit was filed, defendants 2, 5 and 6 have died, and the tenth defendant has become an insolvent. No legal representatives have been brought on record to represent the deceased defendants and the suit has proceeded against the remainder. No point is made by either party in regard to this. Several issues were settled as arising in the suit, but at the outset, counsel on behalf of all parties agreed that the only matter for decision is whether the second plaintiff was properly dismissed.

At this temple, it has been customary to have two trustees or dharmakartas, one appointed from the interested community, the Poonamalle Ooyarthuluva Vellala community and one from the members of the family of the founder of the temple. Prior to the month of April 1934, the two trustees of the temple were the first plaintiff and M. N. A. Annamalai Mudaliar. In that month, the latter trustee died. The first plaintiff represented the above community and at the date of the death of the deceased trustee there was no one available amongst the members of the founder's family for appointment as a trustee to fill the vacancy. At this period, the second plaintiff was a member of the Committee. Under the provisions of S. 11 of the Act, a member of the Committee is incapable of being or acting as a trustee of any temple under the superintendence of the Committee. A meeting of the Committee was held on 28th April, 1934, and the second plaintiff, having resigned from membership of the Committee, he was thereupon appointed as an interim dharmakarta. From that date, the plaintiffs functioned as trustees of the temple. At this

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temple, there is an office of overseer, and this appointment would seem to be peculiar to this temple.

Almost from the outset, difficulties and friction between the trustees and the Committee arose. The annual temple accounts and report of the auditor, Ex. B-1, for the year ending 12th April, 1933, were sent to the plaintiffs with the Committee's letter, Ex. B-2 dated 7th May, 1934, and the plaintiffs' remarks were invited upon the various points mentioned in the letter. The second plaintiff was not a trustee during the period covered by the accounts and report. The plaintiffs delayed some months before forwarding their observations and were repeatedly urged by the Committee to reply to the above letter. On 25th January, 1935, Ex. A-8, the plaintiffs wrote a long communication to the Committee setting out in detail their remarks and observations upon the accounts and report, and they also dealt with various other matters. The Committee did not take any exception to or criticise this letter or suggest that the contents were not accurate statements of fact, and Mr. Nataraja Mudaliar, the 10th defendant, the only witness called on behalf of the defendants, also did not in any way canvass the contents of this letter. At no time was it ever suggested that it was inadequate or unsatisfactory.

At a meeting of the Committee held on 6th May, 1935, the second plaintiff was dismissed (or as the plaintiffs desire to express it, his services as interim dharmakarta were terminated) with effect from 10th May, 1935. The reasons put forward by the Committee for this being done are set out in the proceedings of the Committee, Ex. A-2, to which I shall refer presently. At the same meeting, Mr. M. Alagappa Mudaliar was appointed an interim dharmakarta of the temple from 10th May, 1935, until further orders.

The second plaintiff contends that his dismissal was invalid and irregular for the following reasons:—

(1) He was not guilty of any act which justified dismissal and no good cause existed for the termination of his services;

(2) The meetings and proceedings at which the Committee purported to terminate his services and dismiss him were irregular because—

(*a*) the consideration of his conduct was not a subject upon the agenda of the meeting and notice of this was not given to members of the Committee;

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(b) No notice was given to the second plaintiff that there were charges against him or that his conduct was to be considered at the meeting of the Committee;

(c) He was not afforded an opportunity to meet the charges made against him.

(3) The second plaintiff was appointed an interim trustee until a member of the founder's family was available and he was not removable in the absence of good cause or misconduct save upon the appointment of such a person.

Mr. V.V. Srinivasa Aiyangar, on behalf of the defendants, contended that the temple properties are vested not in the trustees but in the Committee, and the former are merely clerks or servants of the latter and dismissible at their pleasure. He quoted in support of his argument *Golam Hossain Shah* v. *Altaf Hossain*[1] and *Shenton* v. *Smith*[2]. The latter authority, in my view, is not in point in any way. *Sendilvelu Mudaliar* v. *Venkatasubbu Mudaliar*[3] was a suit concerned with the same temple as the present case, and a similar attempt was made to raise the same contention which I have just set out. In his judgment at page 480 Varadachariar, J., said that it was unnecessary for the purpose of the case then under consideration to deal with those contentions and he refrained from expressing any opinion particularly as a suit (the present suit) was pending in which those questions might arise for decision. So far as the Madras Presidency is concerned, the position has been made perfectly clear by a series of decisions of this Court. A trustee is not a servant of the Committee and is dismissible only after due enquiry into the facts of the trustee's conduct; the trustee must be given notice of any charges against him and afforded an opportunity to meet them; the facts justifying dismissal must amount to misconduct. The Committee do not represent the properties of the temple and are not entitled to possession of the temple or of its properties. The person who does represent the temple and the properties and in whom they are vested is the trustee appointed by the Committee. (See *Ponnuranga* v. *Nagappa*[4], *Seshadri Aiyangar* v. *Nataraja Aiyar*[5], *Pattikadan Ummaru* v. *Emperor*[6], *Sitharama Chetty* v. *Sir S.*

1. (1933) I.L.R. 61 Cal. 80.
2. (1895) A.C. 229.
3. (1937) 2 M.L.J. 477.
4. (1889) I.L.R. 12 Mad. 366 at 367-8.
5. (1898) I.L.R. 21 Mad. 179 at 220.
6. (1902) 6 M.L.J. 14 : I.L.R. 26 Mad. 243 (N.).

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Subramania Aiyar[1] *Ramanathan Chettiar* v. *Swaminatha Aiyar*[2], *Ponnambala Pillai* v. *Muthu Chettiar*[3] and *Sundararama Sastri* v. *Anantha Krishna Naidu*[4].) All these decisions are pronouncements either of a Division Bench or of a Full Bench of this Court.

I propose now to refer to the grounds upon which the Committee purported to find as justifying the second plaintiff's dismissal. These are three, and as mentioned earlier, are contained in Ex. A-2:

(1) failing to submit a detailed report of the leases of the temple properties, the amount of the arrears of rent, the sums collected and if any, and what, of the outstandings are barred by the provisions of the statute of limitations;

(2) preventing the members of the Committee from holding their meetings in the temple premises;

(3) Breaking open the hundi boxes without notice to the Committee and without obtaining the 2nd key.

It is to be noticed that the delay by the plaintiff in forwarding to the Committee their observations regarding the accounts for the year ending 12th April, 1933, Ex. B-1, and the plaintiff's observations of the accounts were not relied upon as a ground for dismissal of the second plaintiff.

It is convenient now to deal with the above three grounds seriatim.

(1) On 22nd October, 1934, in their letter Ex. B-13 addressed to the plaintiffs, the Committee recorded a resolution passed at a recent meeting whereat it was resolved that the trustees be requested to submit a detailed list of immovable properties belonging to the temple and also to furnish full information about the leases relating to these properties, including oral leases, if any, and to state the arrears of rent, how much rent had been collected, and if any portion had become barred and the amount thereof. A reply was requested within a fortnight from the date of the receipt of this letter. In his evidence, the second plaintiff said that the trustees were making collections and had received a larger sum than had been collected a year previously. He also stated that a reply

1. (1915) 30 M L.J. 29: I.L.R. 39 Mad. 700 at 717.
2. (1912) 23 M.L.J. 278 at 281. 3. (1916) 30 M.L.J. 619.
4. (1916) 5 L.W. 672 at 678.

to Ex. B-13 had been sent. This reply is Ex. A-8 dated 25th January, 1935, a long communication of about 22 pages in which detailed information regarding the accounts and other matters was sent to the Committee. At page 20 of this letter, the plaintiffs wrote that a year previously the overseer of the temple had taken away the inventory of the properties and other books and that the Committee, although it had occasion to have these books, returned them to the overseer and the Committee had been informed that in the absence of the books the trustees found it difficult to get on with their work and the information concerning the temple leases was contained in those books. Also an auditor every year took into account a list of all leases, the amounts collected, the amounts in arrear and appended this as a D. C. B. statement to his report. The trustees would prepare a report at the close of the Tamil year when they could determine which debts were bad and doubtful and which could be written off and that the work involved was heavy. I have already mentioned that to this letter, which was received nearly four months before the second plaintiff was dismissed, no exception was taken by the Committee nor was it ever alleged that its contents were not accurate. At page 334 of Ex. A-4, the proceedings of the Committee, a record appears that an inventory of the temple properties was sent to a sub-committee. The Committee therefore when they made their request in Ex. A-13 must have known they had a list of the temple properties available. The failure by the plaintiffs to furnish to the Committee the lists and the particulars required does not in any way justify the Committee in relying upon this as a ground for justifying dismissal. From the information before me, I think the failure was through no fault of the trustees. Further, the Committee upon receiving the letter, Ex. A-8, dated 25th January, 1935, never suggested that the trustees had failed to comply with the Committee's earlier request. To justify dismissal, the failure must amount to misconduct and in my view this was not misconduct.

(2) For some years prior to May, 1935, it had been the practice to hold Committee meetings at the houses, offices or business chambers of the members of the Committee. The last occasion when the Committee held its meeting at this temple was about the year 1931 or 1932, at the time when the

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second plaintiff was not a member of the Committee. In Exs. B-8, B-10, B-11, B-12 and B-15, the Secretary to the Committee informed the plaintiffs that either a meeting had been arranged to be held at the temple on a specified date or a request was made to arrange for a meeting to be held on any day suggested. In Exs. B-9 and B-16, the plaintiffs pointed out that meetings were usually held at the places I have already indicated, and they raised objection to the temple being used for this purpose particularly since on one or other occasion reference had not been made to themselves beforehand and they had not been previously consulted. In Ex. A-8, at page 21, the plaintiffs referred to this matter and apparently objected to a resolution passed by the Committee that the members of the Committee had a right to hold meetings in the temple. As pointed out earlier, the temple is not vested in the Committee but in the trustees, and strictly they have a right to accede to or refuse the request of the Committee, when such requests are made. It would seem that since the Committee, without reference to the trustees in the first instance had fixed a meeting to be held in the temple, the plaintiffs felt that they and their positions had been ignored. Whilst it may have been more convenient and indeed courteous if the plaintiffs had afforded facilities to the Committee for holding their meetings in the temple, their refusal to place the temple at the disposal of the Committee, in my view, does not amount to a ground which justifies dismissal of the second plaintiff as trustee.

(3) Each trustee had in his possession one key of the hundi boxes, which could be opened only when both these keys were available. During the lifetime of Annamalai Mudaliar, the deceased trustee, he had in his possession one of the keys, the first plaintiff having the other. The plaintiffs sent to the sons of the deceased Annamalai Mudaliar a letter, Ex. A-6 on 23rd May, 1934, requesting that the key in the possession of their late father should be given to the trustees. This was not done. As it was necessary for the hundi boxes to be opened the plaintiffs advertised in the *Swadeshamitran* on 9th March, 1935, Ex. A-47 the intention to open the hundi boxes on a date and at an hour mentioned, and at this time these hundi boxes were opened in the presence of four or five persons. In my view, the conduct of the plaintiff was perfectly

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proper in regard to the hundi boxes, and the Committee cannot in any way suggest that the forcing open of these boxes was improper in any way. At the trial, no attempt was made to suggest that this was a ground which justified the second plaintiff's dismissal.

Under S. 13 of the Act, it is the duty of the trustees to keep an account of the receipts and disbursements and it is the duty of the Committee to require production of such accounts, at least once in a year. There is no suggestion that the second plaintiff had not kept these accounts or had failed to produce them before the Committee. The second plaintiff as trustee was not a clerk or servant of the Committee. He was removable only upon good cause being shown and not otherwise. The only grounds upon which the Committee now seek to justify dismissal are these; the failure to supply the information regarding the temple leases and properties and preventing the holding of Committee meetings in the temple. I have already dealt with these matters. Further, by S. 14 of the Act, any person interested in a temple is empowered to sue a trustee for misfeasance, breach of trust or neglect of duty and the Civil Court may direct removal of a trustee. The grounds upon which the Court can remove him are those stated above. Neglect of duty which justifies removal must be of the same seriousness as misfeasance or breach of trust. Neither of the grounds relied upon by the Committee can, in the circumstances, amount to misfeasance or breach of trust. Even if these acts had amounted to neglect of duty, which I do not think they did, the Civil Court could not have directed the second plaintiff's removal, and the Committee cannot have greater powers than the Court in regard to this. The Committee appears to have endeavoured to exercise some form of disciplinary control over the trustees and to treat them as holding inferior positions to that which they held. This attitude of the Committee is dealt with in *Seshadri Aiyangar* v. *Nataraja Aiyar*[1] by Shephard, J., at page 184 who in the course of his judgment said:

"The notion that the Committee may exercise disciplinary powers over trustees appears to me alike unsupported by the provisions of the Act, and inconsistent with the position of a trustee having property vested in him and charged with the gratuitous performance of important public duties. His

1. (1898) I.L.R. 21 Mad. 179.

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position is not that of a servant of the Committee. He has what may be called a freehold in his office, and except for good cause shown he cannot be removed from it."

In my view, there was no justification whatever for the second plaintiff's dismissal from his office as trustee by the Committee.

Even if the grounds put forward by the Committee to dismiss had been justified, nevertheless, in my view, the dismissal of the second plaintiff was invalid. An enquiry must be held into the complaint of charges made against a trustee who should be informed of the charges and called upon for an explanation and given an opportunity to meet them. See *Seshadri Aiyangar* v. *Nataraja Aiyar*[1], *Ponnambala Pillai* v. *Muthu Chettiar*[2] and *Sundararama Sastri* v. *Anantha Krishna Naidu*[3].

Notice of the meeting at which such enquiry is to take place or the conduct of the trustee is being considered should set out that such matter is one which will come before the Committee. In *Rama Aiyar* v. *Sivagnanam Pillai*[4], a notice calling a meeting of a Devasthanam Committee did not state that one subject to be considered at the meeting was that of the appointment of a new trustee or trustees and it was held that since this business was not included in the notice and was not a subject which was to be considered by the Committee at its meeting, the appointment was invalid. It must follow that similar requirements are necessary in regard to a meeting at which a trustee is dismissed. The second plaintiff was not informed that his conduct was to be considered at a meeting of the Committee. No notice was sent to him and no charges or allegations made against him, and he was not afforded an opportunity of meeting those charges. It was not suggested by learned Counsel on behalf of the defendants that the notice of this meeting included any reference to the plaintiff's conduct or that it was to come under review, and it was not one of the matters on the agenda for that meeting. Ex. A-3 is the agenda of the previous meeting of the Committee held on 20th April, 1935. Nothing appears in the agenda of that meeting regarding any charges made against the second

1. (1898) I.L.R. 21 Mad. 179 at 219-221.
2. (1916) 30 M.L.J. 619 at 621.
3. (1916) 5 L.W. 672 at 681.
4. (1927) 54 M.L.J. 140 : I.L.R. 51 Mad. 68.

plaintiff or that his conduct was to be considered at the meeting. He was dismissed at the meeting held on 6th May, 1935, the agenda of which merely states that the business will be the unfinished subjects of the previous meeting.

It was argued on behalf of the defendants that it was not necessary to give the plaintiff any notice of charges or to state that his conduct was to be reviewed or that it was necessary to state in the notice of meeting that this matter was for consideration. Also that there was no necessity that he should be given an opportunity to explain his conduct as this was well known to members of the Committee. In my view, this contention cannot in any way be supported. It is contrary to a long line of decisions of this Court and opposed to natural justice.

As these necessary requirements regarding the plaintiff and the meeting at which he was dismissed were not complied with, even if grounds justifying dismissal had existed, his dismissal was irregular and invalid. Although the first plaintiff was concerned equally with the second plaintiff in all the matters to which I have referred, the latter alone was dismissed. I was informed during the course of the hearing that since this suit had been filed, the first plaintiff had also been discharged. It is somewhat strange that the second plaintiff should have been singled out for the Committee's action.

Although, as I mentioned earlier, it was agreed between Counsel that the only matter for decision in this suit was whether the second plaintiff's dismissal was wrongful and that if it was he was entitled to the relief claimed and if it was not that the suit must be dismissed, learned Counsel on behalf of the defendants at a later period at the trial raised two further contentions.

(1) Since the second plaintiff was an interim trustee, he could be dismissed peremptorily by the Committee.

(2) Even if the second plaintiff established that his dismissal was unjustified and invalid, since the Committee could dispense with his services and appoint a permanent trustee from the members of the founder's family at any time the Court could not afford him the relief claimed since the action of the Committee could render a decree for relief nugatory.

As to (1), I mentioned earlier that it was customary in regard to this temple to appoint a trustee from members of the

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family of the founder and that none was available when the second plaintiff was appointed. Prior to the meeting at which the appointment was made, the overseer had written to the Committee on 21st April, 1934, suggesting that an appointment of an interim dharmakarta should be made pending the determination of the Committee of a permanent incumbent. *See* Ex. A-1. Mr. Nataraja Mudaliar in the earlier part of his evidence said that the second plaintiff was appointed for such period as the Committee might be pleased that he should act or until he proved recalcitrant. No mention is made of this term in the record of the minutes of the meeting on 28th April, 1934. Up to the date of this meeting, the second plaintiff had been a member of the Committee and held its full confidence. I do not accept Mr. Nataraja Mudaliar's evidence in this respect. Later on this witness admitted that the appointment was made in order to give effect to the overseers' suggestion. This admission was in accordance with the evidence of the second plaintiff who said he was appointed as an interim trustee until a member of the founder's family was available, and I accept his testimony. The trustee, as pointed out above, has what may be called a freehold in his possession. See *Seshadri Aiyangar* v. *Nataraja Aiyar*[1], Shephard, J., at page 184, and again the same learned Judge at page 185, says that no provision is made in the Act for the appointment of a temporary manager. Whilst the second plaintiff was, perhaps, not appointed for life, as is usual with trustees of a temple, he was not a temporary manager, he was appointed until there was some member of the founder's family available. Up to the present time, no such person has been appointed and Mr. M. Alagappa Mudaliar who succeeded the second plaintiff has not been functioning ever since May 1935, over three years ago. Although the Act may make no provision for a temporary trusteee, the second plaintiff was appointed until the happening of a specified event and he accepted the office on that understanding. Until this event occurred, he was entitled to hold the office of trustee. It may be—and I am not expressing an opinion one way or the other—that since temporary trustees or managers are not contemplated by the Act, and the second plaintiff having been appointed trustee although called an

1. (1898) I.L.R. 21 Mad. 179.

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'interim trustee', he may be able to maintain that he cannot be displaced. That is a matter however which is not one for decision by me.

As to (2) the Committee cannot displace the second plaintiff, certainly before a member of the founder's family is available. There was no evidence, indeed there was no suggestion, that such a person is now, or has been, or is likely to be, available. *Maharaj Narain Sheopuri* v. *Shashi Shekhareshwar Roy*[1] was quoted in support of this contention. In that case, it was held that the Civil Court ought not to entertain a suit for a declaration that a person who has been illegally deprived of an office in a society in as much as a decree in his favour might be rendered nugatory by the action of the society. The plaintiff in that case held an honorary position and the rules of the society permitted it to discontinue his services at any time. In my view, that decision is not in point.

Although the minutes of the Committee meeting held on 6th May, 1935, regarding the appointment of the twelfth defendant as interim trustee, do not state that he was to act in the place of the second plaintiff, it is obvious he was so appointed. As I am satisfied that the second plaintiff's dismissal was irregular and invalid, it must follow that the Committee has no power to appoint any person in his place. Whilst the Act does not limit the number of trustees to be appointed in respect of any temple, as far as the information before me goes, there never has been more than two trustees for this temple. Further, the twelfth defendant was appointed by the same meeting as that which dismissed the second plaintiff. No notice was given that a subject of that meeting was the appointment of a new trustee, nor was this a subject upon the agenda of the meeting. For the reasons I have given and following the Bench decision in *Rama Aiyar* v. *Sivagnanam Pillai*[2], the appointment of the twelfth defendant as trustee was invalid. When the suspension of a trustee of a temple was illegal, a declaration to that effect was granted in *Venkata Narayana Pillai* v. *Ponnuswami Nadar*[3]. See Wallis, C.J., at page 365. The power of suspension by a Committee is the same as the power of dismissal. See *Seshadri Aiyangar* v. *Nataraja*

1. (1915) I.L.R. 37 All. 313. 2 (1927) 54 M.L.J. 140: I.L.R. 51 Mad. 68.
3. (1917) 33 M.L.J. 660: I.L.R. 41 Mad. 357.

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Aiyar[1], Collins, C. J., at page 221. The second plaintiff having been illegally dismissed, he is entitled to relief in the suit.

There will be a declaration:—

(*a*) that the dismissal of the second plaintiff as trustee of this temple was irregular and illegal and that he is entitled to continue in his office;

(*b*) that the appointment of the twelfth defendant in the place of the second plaintiff as trustee was illegal and invalid;

(*c*) that the meeting and resolutions of the Committee held on 6th May, 1935, at which the second plaintiff was dismissed and the twelfth defendant was appointed an interim trustee were illegal and invalid.

There will be an injunction restraining the defendants except defendants 2, 5 and 6 from interfering with the plaintiff's duties as a trustee of the temple and his possession and management of the temple and its properties as such trustee.

There will be an order for the second plaintiff's costs against all the defendants except defendants 2, 5 and 6, which costs will carry interest at the rate of 6 per cent. per annum until payment.

The first plaintiff is not entitled to and has obtained no relief in this suit. His presence as a party was unnecessary and as against him this suit is dismissed. His inclusion as a plaintiff in the suit has occasioned no increase in the amount of the costs and therefore I make no order against him for payment of any costs.

K. C. —— *Suit decreed.*

1. (1898) I.L.R. 21 Mad. 179.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

Boda Viraraju .. *Appellant** (*Plaintiff*)

v.

Vetcha Venkataratnam and others .. *Respondents* (*Defendants 1 to 19 and 21 to 24 and nil*).

Viraraju *v.* Venkataratnam.

Hindu Law—Widow in possession of her husband's estate—Powers of to make a gift to a dependant relation or for meritorious objects—Instructions of husband to alienate for particular objects—If sufficient justification for alienation for those purposes.

A Hindu widow in possession of her husband's estate is in no sense a trustee for the ultimate reversioner. She is the owner for the time being, fully capable of representing the estate in her transactions with the outside world so long as she acts *bona fide* and in the interests of that estate, but it is an ownership qualified by certain limitations which are of the very essence of her estate—imposed not out of regard for the reversioner but for reasons intimately bound up with ideals of life and conduct considered proper for her in life. For purposes which are purely secular or temporal her powers are no wider than those which inhere in the manager of an infant's estate. But in respect of those other purposes which the Hindu Law regards as religious or charitable, she possesses a larger discretion and a wider authority. For obligatory necessary observances essential for the salvation of her husband's soul, she could go the length of disposing the whole estate, where it is not considerable, and when the requirements of the particular occasion demand it. For other or less peremptory purposes, she may dispose of a reasonable portion of the estate. Marriages of girls born in the family and maintenance of female members stand on a higher footing and come under the head of strict legal necessity. In respect of pious or charitable acts, what a husband might have done, the widow is competent to do after his death. If her husband had himself instructed her to incur particular charges or specified the particular objects for which the alienations were to be made, such direction, though not a valid bequest, will be a sufficient justification for her acting upon them.

Appeal against the decree of the Court of the Subordinate Judge of Rajahmundry dated 28th April, 1932 and passed in O. S. No. 60 of 1930.

P. V. Vallabhacharyulu for Appellant.

K. Kameswara Rao, V.V. Ramadurai and *K. P. Panchapakesa Aiyar* for Respondents.

The judgment of the Court was delivered by

Krishnaswami Aiyangar, J.

Krishnaswami Aiyangar, J.—We have found very little difficulty either in the ascertainment of the true principle of

*Appeal No. 288 of 1932. 29th August, 1938.

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law or in the application of it to the facts disclosed in this appeal. Whether and to what extent a Hindu widow in possession of her husband's estate can make a gift in favour of a dependant relation or for objects considered meritorious by the Hindu religion was the question discussed before us at the hearing of this appeal. It is unnecessary for a decision of this question to carry a research into the ancient texts of Hindu Law, or indeed to do anything more than refer to two decisions of the Privy Council in which the principle has, if we may say so with respect, been clearly and precisely defined. As early as 1861 it was laid down in *The Collector of Masulipatam* v. *Cavaly Vencata Narrainapah*[1] where their Lordships observed that:

"For religious and charitable purposes or those which are supposed to conduce to the spiritual welfare of her husband she (the widow) has a larger power of disposition than that which she possesses for purely worldly purposes. To support an alienation for the last, she must show necessity"

The principle received further elucidation by their Lordships in *Sardar Singh* v. *Kunj Bihari Lal*[2] in which the widow had made a gift of a small fraction of the estate for the observance of *bhog* (food offerings) to the deity at Puri. The gift was upheld in spite of the fact that she had a sufficient income available in her hands to provide for it without an alienation. Their Lordships drew a sharp distinction between obligatory religious ceremonies and those other observances which are merely optional though conducive to spiritual good. They said:

"There can be no doubt upon a review of the Hindu Law taken in conjunction with the decided cases that the Hindu system recognises two sets of religious acts. One is in connection with the actual obsequies of the deceased and the periodical performance of the obsequial rites prescribed by the Hindu religious law, which are considered as essential for the salvation of the soul of the deceased. The other relates to acts which, although not essential or obligatory, are still pious observances which conduce to the bliss of the deceased's soul. In the later cases this distinction runs clearly through the views of the learned Judges . . . . With reference to the first class of acts the powers of the Hindu female who holds the property are wider than in respect of the acts which are simply pious and if performed, are meritorious so far as they conduce to the spiritual benefit of the deceased. In one case, if the income of the property, or the property itself is not sufficient to cover the expenses, she is entitled to sell the whole of it. In the other case she can alienate a small portion of the property for the pious or charitable purposes she may have in view."

1. (1861) 8 M.I.A. 529.
2. (1922) 44 M.L.J. 766: L.R. 49 I.A. 383: I.L.R. 44 All. 503 (P.C.).

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These observations have furnished valuable guidance for the Courts in India in approaching the decision of questions relating to a widow's power of alienation. The principles that emerge from the decided cases may be stated in these terms. A Hindu widow in possession of her husband's estate is in no sense a trustee for the ultimate reversioner. She is the owner for the time being, fully capable of representing the estate in her transactions with the outside world so long as she acts *bona fide* and in the interests of that estate, but it is an ownership qualified by limitations which are of the very essence of her estate—limitations which the law imposes not out of a tender regard for the right of the reversioner, for none such exists during her life, but for reasons which are intimately bound up with the ideals of life and conduct considered proper and appropriate for a person in her position. A simple life of abstemious piety directed to the acquisition of merit for the departed soul of her husband and a cessation from mere sense-enjoyments in the pursuit of pleasure for its sake, lie at the bottom of restrictions on her powers of disposal. It is to be remembered that according to the ancient law-givers, restriction was indeed the rule, absolute power an exception, whether the holder was a female or even a male. For purposes which are purely secular or temporal, her powers are no wider than those which inhere in the manager of an infant's estate. But in respect of those other purposes which the Hindu Law regards as religious or charitable, she possesses, as might naturally be expected, a larger discretion, and a wider authority[1]. For obligatory necessary observances essential for the salvation of her husband's soul, she could go the length of disposing of the entirety of the estate, where it is not considerable, and where the requirements of the particular occasion demand it. For other but less peremptory purposes, though in themselves meritorious yet not indispensable, her authority is necessarily circumscribed. She may for such objects, only dispose of a small and no more than a reasonable portion of the estate the quantum to be measured by the custom and sentiment prevalent in the community to which she belongs. It is impossible to define her powers in this behalf with any more precision. The circumstances of the family, the extent of its

1. Texts collected in *Ram Sumran Prasad* v. *Gobind Das*, (1926) I.L.R. 5 Pat. 646 at 677 to 679.

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property, the demands upon it of other legitimate calls, and all those social customs and sentiments which make up what one may call the conscience of the community, must, it seems to us, be among the main factors to be considered. We think that it is the same principle though expressed in different language, which we find laid down in *Cossimant Bysack* v. *Hurrosoondry Dossee*[1], where Lord Gifford said that care might be taken to avoid impressions derived from the English law, and to consider in what way? a Hindu Court of Justice would have decided the point.

Marriages of girls born in the family and the maintenance of female members stand on a higher footing. For, it is a legal obligation cast on the father, the *karta* or whoever happens to be in possession of the family estate to defray, out of it, the expenses necessary for these purposes, which accordingly come under the head of strict legal necessity. How exactly this obligation is to be carried out whether by a mortgage, sale or other means, is not to be determined by strict rules or legal formulae, but must be left to the reasonable discretion of the party bound. In the absence of *mala fides* or extravagance and so long as it is neither unfair, in character nor unreasonable in extent, the Court will not scan too nicely the manner or the quantum of the alienation. A widow, like a manager of the family, must be allowed a reasonable latitude in the exercise of her powers provided she acts fairly to her expectant heirs and in a manner conformable with the legitimate wishes of her husband or the prescriptions of Hindu Religious Law. It may also be observed that, in respect of pious or charitable acts, what a husband might have done, the widow is competent to do after his death. For according to an ancient text of Brihaspathi[2], the husband and wife participate in the effects of good and evil actions and this mutual relation is not dissolved by death of either partner (*Khub Lal Singh* v. *Ajodhya Misser*[2] and *Venkaji Shridhar* v. *Vishnu Babaji Beri*[3]). Her position will be much stronger if the husband had himself instructed or directed her to incur the particular charge or specified the objects for which the alienation was to be made.

1. (1819) 2 Morley's Digest 198.
2. (1915) I.L.R 43 Cal 574 at 582.
3. (1893) I.L.R. 18 Bom. 534.

Such directions, though short of the requirements of a valid bequest, are, we think, a sufficient justification for her acting upon them.

Bearing these principles in mind we proceed to refer to the facts found or established in the case. The disputed alienations are all gifts of land made by Mahalakshmi, a widow who had succeeded to the estate of her husband Sarayya who died on 18th December, 1890, leaving him surviving besides her, two daughters, Saramma and Mariamma. Both of them were alive at the date of the gifts, though Mariamma appears to have died later unmarried. The estate consisted of 32 acres of land, out of which 8 acres were conveyed on 7th April, 1891, to Venkamma, the widow of Nagalingam the paternal uncle of Sarayya. There were four other gifts of 2-19 acres in all made in favour of four Brahmins on 3rd April, 1891, by separate deeds of gift. The properties originally belonged to the joint family of two brothers Nagalingam and Venkatachellam the latter being the father of Sarayya. It is in evidence that it was Nagalingam who acquired the properties for the family. Nagalingam died long ago leaving besides Venkamma his widow, the donee under the deed of 7th April, 1891, two daughters Venkatasubbamma and Saramma, both of whom were also alive at the date of the gift, and were probably unmarried and living with their mother. On 27th January, 1901, Venkamma in her turn executed two deeds of gift giving to each of her daughters a moiety of the lands she had obtained from Mahalakshmi. Venkatasubbamma's moiety has been purchased by the ninth respondent, and Saramma's is held by respondents 1 to 8 claiming under a bequest made by her on 7th February, 1908. Respondents 10 to 19 are either themselves donees or persons who claim under the donees under the gifts of 3rd April, 1891.

Mahalakshmi died on 19th July, 1930. The appellant claiming to be the son adopted by Mahalakshmi's daughter Saramma and her husband Seshayya has now succeeded to the estate of Sarayya as his daughter's son. His adoption though disputed in the trial Court, has not been challenged before us. By the suit out of which this appeal arises the appellant has impugned the gifts as being beyond the powers of Mahalakshmi and consequently not binding on him and has sought the recovery of the properties conveyed, together with

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mesne profits. According to him, the gift to Venkamma is invalid as no necessity for making it has been proved, and as Mahalakshmi had in her hands at the time a sufficient income from the assets, from which she ought to have met the expenses of maintaining Venkamma. This circumstance is no doubt an element to be taken into account, but no serious importance can be attached to it, for we find it existed in *Sardar Singh* v. *Kunj Bihari Lal*[1], but made no difference in their Lordships' decision. As regards the other gifts, it is argued that the purposes for which the gifts were made have not been sufficiently established, as there was nothing to indicate that the widow acted from motives of religion or piety and apart from this, that such gifts even though of small portions of the estate cannot be made except on special ceremonial occasions.

Now first with reference to the gift of Venkamma, she was the widow of a coparcener of the family, who was, while alive, entitled to a half of the family property, besides having been the founder of the family fortune. After his death, his brother Venkatachellam and his nephew Sarayya were both under a legal obligation to maintain her and her two daughters, and also to provide for the marriage of the latter. This obligation, as we have already pointed out, partakes of the nature of the legal liability binding on Mahalakshmi when she took her husband's estate on his death. It would also have been perfectly proper and legitimate for any of these persons to set apart a reasonable fraction of the estate by way of a provision for the benefit of the daughters, though such an obligation rests on a moral or religious basis, rather than on a legal one. In these circumstances, and in response to a request from her, the gift was made to Venkamma. We have no doubt that though the gift purports to have been in terms made to Venkamma only, it was really intended for the benefit not only of herself but also of her daughters, and in fact, as we have already said Venkamma conveyed away the property to her daughters in 1901. We are further of opinion that the gift is reasonable in extent, and fully supported by the legal and moral considerations which ought to weigh, and did weigh, with Mahalakshmi in making the gift. The propriety of the alienation appears also from two other circumstances. We find that the deed has been attested by Boda Seshayya the

1. (1922) 44 M.L.J. 766: L.R. 49 I.A. 383: I.L.R. 44 All. 503 (P.C.).

husband of Mahalakshmi's daughter, who later on adopted the plaintiff. At the time, he was certainly interested in preventing the frittering away of the estate, and his conduct in not having objected to it then or at any time thereafter till the institution of this suit, points to the fact that it was not considered an objectionable alienation by him. Besides, the gift was made publicly in the presence of several other relations who appear to have gathered together in connection with the ceremonies that were being performed at the time. Most of these persons have also attested the gift. For nearly 40 years the gift has stood unchallenged; the properties in the meanwhile have changed hands and it is remarkable that no one, neither Mahalakshmi nor any other person, relation or friend, moved in the matter or took any steps to set it aside all this time. Such inactivity in respect of what is now alleged to be a thoroughly bad gift does suggest to our mind that there could not have been any serious objection to it. Further we find that there is a recital in the gift deed to the effect that it was executed in pursuance of the order given to Mahalakshmi by her husband. After the lapse of such a long time, and the death of almost all the witnesses who were aware of the circumstances in which the gift was made, the recital acquires great force, and it would be proper for us even without any evidence *aliunde*, to rely on it as proving the propriety of the transaction. Though there is the direct evidence of D.W. 1 Venkataratnam in support of the truth of the recital, we prefer to act on the well-recognised rule that in such cases, it is permissible to fill in details obliterated by lapse of time for the purpose of supporting an ancient alienation. The learned Subordinate Judge has on a review of all the facts and circumstances come to the conclusion that the gift to Venkamma was a proper provision, having regard to the status and property of the family, and we have no hesitation in saying that he was perfectly right in that view.

There remain the four other gifts to be considered. These gifts comprised small, very small pieces of land made in favour of four Brahmins before the end of the year following the death of Sarayya. The parties belong to the Vysia community well known for their charitable disposition, who practically copy the Brahmin customs with respect to 'ceremonial observances, and who regard or have at any rate till recently regarded, a gift to

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Brahmins as meritorious. The many religious charities which that community have established all over the presidency bear witness to this disposition. Gifts of this kind are often made at the funeral rites on the 12th day of the death and on the first anniversary, but it is not to be forgotten that the whole of the first year after death is regarded as a period of ceremonial activity necessitating the performance of monthly and other ceremonies for the benefit of the deceased's soul,—a period peculiarly appropriate for gifts for securing religious merit. Though it is not shown that these gifts were made on the occasion of any particular ceremony, we do not think that this is necessarily an invalidating circumstance. Here again the learned Judge in the Court below has referred to the recitals in the three deeds produced into Court—the fourth has not been filed or exhibited—which gave prominence to the directions of the husband in this behalf as authorising the gifts. Even apart from such a specific direction which will, of course, be a sufficient authority, the law will raise a presumption of authority when the act done is good and proper and has the sanction of the religious law. Further these deeds also are attested by the relations of the parties including the adoptive father of the plaintiff. It was urged that there was nothing to indicate that they were made for the express object of securing religious merit to the husband's soul. We think that there is no substance in this objection, for it is clear in the circumstances that there was no other object that could be regarded as having prompted the gift. The donees were Brahmins. The plaint itself suggests no other object but a pious consideration in the mind of the donor. Paragraph 7 says:

"Shortly after her husband's death, Mahalakshmi who was an illiterate and ignorant woman and who was immersed in grief, was prevailed upon by Dantu Narasimhalu and other Brahmins of Mandapeta and she was made to execute deeds of gift in favour of several people, containing false recitals."

The complaint is not that it was not a pious gift, but that it was brought about in the circumstances which show that the donor was not an independent agent exercising her own free volition. The appellant's advocate also contended that the burden of proof is on the alienees to justify the gift and that it has not been discharged by them. Though none of the donees except the 10th defendant actually contested the claim, yet we must hold that in this case, the burden has been discharged, as there is satisfactory proof appearing in the evidence to show

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that there was ample justification for this widow to make the gifts. Concurring with the Subordinate Judge we hold that the gifts to the Brahmins are also valid. The appeal therefore fails and has to be dismissed with costs of the 25th respondent. We may mention that as between the appellant and respondents 1, 2 and 4 to 8 there has been a settlement by a compromise which has been made a decree of Court on 31st August, 1937. The 25th respondent will receive the cost proportionate to his interest in the subject-matter of the appeal.

S.V.V. —— *Appeal dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Ordinary Original Civil Jurisdiction.)

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE MADHAVAN NAIR AND MR. JUSTICE VARADACHARIAR.

The Commissioner of Income-tax, Madras .. *Petitioner**

v.

Valliammai Achi, wife of S.M.A.M. Ramaswami Chettiar, Pallathur, Ramnad District .. *Respondent.*

F.B. — Commissioner of Income-tax, Madras v. Valliammai Achi.

Income-tax Act (XI of 1922), Ss. 3 and 4—Saw mill of assessee in Burma—Loss therefrom in 1936-37—If loss to be deemed to be sustained in British India—Burma part of British India when mill was worked.

The assessee, a resident of Pallathur owns a saw mill in Burma. In the account year April 1936-37, the mill resulted in a loss and her income consisted solely of interest received from investments. For purpose of assessment to income-tax she sought to set off the loss sustained in the saw mill against the profits from her investments. Burma ceased to be part of British India on 1st April, 1937 and the loss having been sustained outside British India, the Commissioner of Income-tax held it could not be set off.

Held, that when the assessee worked the mill, Burma was part of British India. Ss. 3 and 4 are to be read together and so reading the loss must be deemed to have been sustained in British India.

Case stated by the Commissioner of Income-tax, Madras, is as follows:—

At the instance of the assessee named above, I have the honour to refer the following case under S. 66 (2) of the Indian Income-tax Act (hereinafter referred to as the Act) for the decision of the High Court.

* O.P.No. 105 of 1938. 1st November, 1938.

F.B.

Commissioner of Income-tax, Madras v. Valliammai Achi.

The petitioner Valliammai Achi is a resident of Pallathur within the jurisdiction of the Income-tax Officer, Karaikudi (II) Circle. For the year 1937-38 this Officer assessed her on a total income of Rs. 14,501 the whole of this being income from investments. The petitioner is the owner of a saw mill and carries on timber business at Gyobingauk in Burma. During the year of account (Tamil year Dhathu—year ended 12th April, 1937) this business resulted in a loss of Rs. 8,663. She claimed a deduction of this amount from her income from investments, but the Income-tax Officer disallowed the claim on the ground that it was a loss incurred by a business outside British India.

The petitioner appealed to the Assistant Commissioner against the assessment. She objected to the disallowance of the loss on the following grounds:—

(1) The loss was incurred in British India as in the year in which it was incurred Burma formed part of British India.

(2) Income-tax is levied in respect of the income of the previous year and the intention of S. 3 of the Act is not to treat the income of the previous year merely as a measure of the income of the year of assessment but to tax an assessee in the year of assessment on the income received by him in the previous year.

The Assistant Commissioner however overruled the objection and upheld the Income-tax Officer's decision disallowing the loss. His reason was that as a result of the separation of Burma from British India with effect from 1st April, 1937, the assessment for 1937-38 of the income, profits and gains accruing or arising in British India to a person resident in British India during the previous year 1936-37 should be made in accordance with the law as it stands at present in relation to Burma. In other words he took Burma to be outside British India for the purposes of the Act in 1937-38, and held that as the loss was incurred outside British India it could not be set off against the income accruing, arising or received in British India.

The petitioner has now asked me to refer to the High Court the following question of law arising out of the Assistant Commissioner's order and I accordingly refer it:

"Whether the decision of the Assistant Commissioner that the loss of Rs. 8,663 incurred by the petitioner in Burma in the year of account 1936-37 is not allowable as a deduction in the year of assessment 1937-38 is correct in law."

The answer to this question depends on the effect of the definition of British India in cl. (7) of S. 3 of the General Clauses Act, 1897, as amended by the Government of India (Adaptation of Indian Laws) Order, 1937, on the operation of sub-S. (1) of S. 4

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read with S. 3 of the Indian Income-tax Act, 1922. The combined effect of S. 3 and of sub-S. (1) of S. 4 is to render British Indian income-tax for the year 1937-38 leviable in respect of the income, profits and gains which in the previous year accrued, arose or were received in British India and the point arising for determination is whether in these circumstances the reference to British India in sub-S. (1) of S. 4 is for the purposes of the above-cited definition of British India a reference to British India as respects the period before the commencement of Part III of the Government of India Act, 1935 (the 1st April, 1937) or a reference to British India as respects a period after that date. In the former alternative the quantum of income on which British Indian income-tax for the year 1937-38 falls to be assessed will include, while in the latter alternative it will exclude, income accruing, arising or received in Burma in the year 1936-37.

In my opinion, the latter alternative is very clearly correct. The provision made in sub-S. (1) of S. 4 read with S. 3 is a provision regulating the assessment to be made in and for the year following the previous year and it cannot be maintained that merely because the assessment is to be made on the income of the previous year the provision is one as respects the previous year. In the terms therefore of the definition of British India the reference to British India in sub-S. (1) of S. 4 is a reference as respects the year following the previous year (here the year 1937-38) and therefore a reference as respects a period after the commencement of the Government of India Act, 1935. In my opinion therefore the loss in Burma in the year 1936-37 has been rightly disallowed and I desire to invite the attention of the Honourable Court to the fact that while in the present case the result of my view is unfavourable to the assessee the result in the vast majority of cases would be in the contrary direction, for if the Honourable Court holds in favour of the assessee in the present case it must follow of necessity that all income accruing, arising or received in Burma in the year 1936-37 is assessable to British Indian income-tax for the year 1937-38.

M. Patanjali Sastri for Petitioner.

The Advocate-General (Sir A. Krishnaswami Aiyar) for *M. Subbaraya Aiyar* for Respondent.

The judgment of the Court was delivered by

Leach, C. J.

The Chief Justice.—The assessee who is a resident of Pallathur in the Madras Presidency owns a saw mill at Gyobingauk in Burma. In the account year, that is the year commen-

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cing from the 1st April, 1936, the saw mill business resulted in a loss of Rs. 8,663 and her income consisted solely of interest received from investments. For the purpose of assessment to income-tax she sought to set off the loss sustained in the saw mill business against the profits from her investments. The Income-tax Officer refused to allow her to do so on the ground that on the 1st April, 1937, Burma had ceased to be part of British India, and the loss having been sustained outside British India, it could not be set off. On these facts the Commissioner of Income-tax has referred to the Court the following question:—

"Whether the decision of the Assistant Commissioner that the loss of Rs. 8,663 incurred by the petitioner in Burma in the year of account 1936-37 is not allowable as a deduction in the year of assessment 1937-38 is correct in law?"

In order to appreciate the arguments advanced on behalf of the income-tax authorities it is necessary to refer to the provisions of S. 3 and of S. 4 (1) of the Indian Income-tax Act. S. 3 is the charging section and it provides that where any Act of the Central Legislature enacts that income-tax shall be charged for any year at any rate or rates applicable to the total income of an assessee, tax at the rate or those rates shall be charged for that year in accordance with, and subject to the provisions of, the Act in respect of all income, profits and gains of the previous year of every individual, Hindu undivided family, company, firm and other association of individuals. S. 4 (1) states:—

"Save as hereinafter provided, this Act shall apply to all income, profits or gains, as described or comprised in S. 6, from whatever source derived, accruing or arising or received in British India or deemed under the provisions of this Act to accrue, or arise, or to be received in British India."

It is said that as the Income-tax Act does not come into operation in any year until the Finance Act has been passed, the Income-tax Act must be treated as a statute which is passed every year, and the words "British India" must be deemed to mean British India as it stands at the time of the passing of the Finance Act and not what it was in the previous year. We do not accept this argument. It is true that the Income-tax Act cannot be applied in any year until the Finance Act has been passed, but the Act cannot be treated as being a statute which is passed annually. It is a permanent enactment but it may not be enforced in any particular year until the Finance Act has been passed. S. 4 cannot be divorced from S. 3 and

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as S. 3 charges the tax on the income of the previous year it must, we consider, be charged on the income received in what was British India during the previous year. In *The Commissioner of Income-tax, Madras* v. *Karuppiah Kangani* alias *Kumaravelu Ambalam*[1], a Full Bench of this Court held that under the Act the income of the year previous to the year of assessment is not to be taken as merely a guide to the ascertainment of the income of the year of assessment but as the actual sum which is subject to taxation. This decision followed a decision of the Calcutta High Court to the same effect—In re *Behari Lal Mullick*[2].

When the assessee in this case sustained the loss on the working of her saw mill in Burma, Burma was part of British India, and if S. 3 and S. 4 (1) are to be read together, as in our opinion they must be, the loss must be deemed to have been sustained in British India. Therefore the answer we give to the question referred is that the decision of the Assistant Commissioner in not allowing the deduction is not correct in law. The assessee is entitled to her costs, Rs. 250 and to the refund of her deposit of Rs. 100.

S. V. V. —— *Reference answered.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Civil Jurisdiction.]

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE MADHAVAN NAIR AND MR. JUSTICE VARADACHARIAR.

S. N. Narayanan Chettiar, Karaikudi, Ramnad Dt. .. *Petitioner**

v.

The Commissioner of Income-tax, Old High Court Buildings, Madras .. *Respondent.*

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Narayanan Chettiar v. Commissioner of Income-tax, Madras.

Income-tax Act (XI of 1922) S. 4, cl. (2)—Assessee carrying number of businesses—Loss in some and profit in others—All income to be looked at for deciding if assessee has earned profit taxable.

Where an assessee carries on two money-lending businesses outside British India in close proximity both being his sole businesses having current transactions and controlled by him and where one of the two businesses has

1. (1928) 55 M.L.J. 844 (F.B.). 2. (1927) I.L.R. 54 Cal. 630

*O. P. No. 118 of 1937. 26th October, 1938.

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suffered loss and the other has profits and the assessee has received remittances from both, in determining whether the remittances so received are his income, profits and gains under S. 4 (2) of the Income-tax Act, the results of both the businesses should be considered together and the assessee is entitled to set off his loss in one business against the profits of the other business to arrive at the resultant profit available for remittance to be taxed.

R. Kesava Aiyangar for Petitioner.

M. Patanjali Sastri for Respondent.

The judgment of the Court was delivered by

Leach, C. J.

The Chief Justice.—The assessee in this case is a Nattukottai Chettiar. He carries on a money-lending business at Karaikudi in the Madras Presidency and at Ipoh in Telukanson in the Federated Malay States. Ipoh and Telukanson lie some fifty miles distance apart. During the year 1934-35 the business at Telukanson showed a profit of $ 16,047, but that at Ipoh showed a loss of $6,598. In respect of the year 1935-36 the assessee was assessed on a total income of Rs. 20,515 which included a sum of Rs. 20,000 remitted to Karaikudi from Telukanson. The Income-tax Officer treated this as a remittance of profits of a foreign business. In addition to the Rs. 20,000 remitted from Telukanson a sum of $1,954·48 was remitted from Ipoh. In view of the absence of profits at Ipoh the Income-tax Officer did not include the $1,954·48 in the assessment. The assessee contended that the sum of Rs. 20,000 remitted from Telukanson should not be treated wholly as profits. He said that the proper method of calculating the profits of his business abroad was to deduct the loss suffered at Ipoh from the profits made at Telukanson. As the assessee had an agent at each of the two towns and the two branches worked independently of each other the Income-tax Officer held that the profits and losses of the two branches should be considered separately, and consequently refused to allow the loss at Ipoh to be set off against the profits at Telukanson. The Assistant Commissioner of Income-tax agreed with the Income-tax Officer when the matter was before him on appeal. and the Commissioner of Income-tax refused to state a case to this Court under S. 66 (2) of the Income-tax Act on the ground that no question of law arose. This Court, however, considered that a question of law did arise and directed the Commissioner to refer to us the following question:—

"Where an assessee carries on two money-lending businesses outside British India in close proximity both being his sole businesses having current

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transactions and controlled by him and where one of the two businesses has suffered loss and the other has profits and the assessee has received remittances from both, in determining whether the remittances so received are his income, profits and gains under S. 4 (2) of the Indian Income-tax Act XI of 1922, should not the results of both the businesses be considered together and is not the assessee entitled to set off his loss in one business against the profits of the other business to arrive at the resultant profit available for remittance to be taxed?"

In our opinion this reference must be answered in the affirmative. S. 4 (2) of the Act allows the Income-tax Officer to assess to income-tax income, profits and gains arising out of British India, but in deciding whether sums which are brought in from a business abroad are income, profits or gains he must have regard to the business as a whole. When a person carries on the same kind of business in two places abroad, in order to ascertain whether he has made a profit the result of the working of the two branches must be considered. If at one branch he makes a profit and at the other a loss the profit in his business can only be the gain made at one branch less the loss suffered at the other branch. So far as this case is concerned we know that at one of the branches a profit was made and at the other place a loss was suffered. When the loss in one case is set off against the profit in the other it is clear that the assessee did not make a profit of Rs. 20,000. His profits at Telukanson stated in dollars were $16,047 and his loss at Ipoh amounted to $6,598. The profit was therefore $9,449. It was only to this extent that the Income-tax Officer could hold that the remittance was out of profits. The decision on the question whether a particular remittance represents profits or capital will turn on the particular facts of each case, but there can be no question of a remittance representing profits when no profits have been earned taking the business abroad as a whole.

The reference having been answered in favour of the assessee there will be an order for costs in his favour. These we fix at Rs. 250. His deposit will also be refunded.

S.V.V. —— *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN AND MR. JUSTICE STODART.

Palacherla Jalamenna .. *Appellant** (*Respondent*)

v.

Marina Ramarao and others .. *Respondents* (*Petitioners—Respondents*).

Jalamenna *v.* Ramarao.

Execution sale—Order of sale of properties—Direction in sale proclamation—Departure from—Material irregularity.

The practice in the Madras Presidency is to sell the lots of properties in the order in which they appear in the sale proclamation and a departure from that order *may* amount to a material irregularity.

Inamullah Khan v. *Shambhu Dayal*, A.I.R. 1931 All. 159 and *Chhuttan Lal* v. *Muhammad Ikram Khan*, (1933) I.L.R. 55 All. 519, considered.

Appeals against the orders of the District Court of East Godavari at Rajahmundry dated 17th September, 1937 and made in I.A. Nos. 29, 38 and 41 of 1937 respectively in I. P. No. 12 of 1935 and in E. A. Nos. 91 and 98 of 1937 in E. P. No. 64 of 1935 in O. S. No. 56 of 1933.

P. Panini Rao for Appellant.

P. V. Vallabhacharyulu for Respondents.

The judgment of the Court was delivered by

Burn, J.

Burn, J.—We consider that the learned District Judge was right in holding that the sale of lot 2 before lot 1 was in the circumstances of this case, an irregularity, and since that irregularity precluded the respondent in A.A.O. No. 429 of 1937 from bidding for the property, it was a material irregularity. We have been referred to two cases in which learned Judges of the Allahabad High Court have held that the sale of items in a different order from that shown in the proclamation is not an irregularity. (*Inamullah Khan* v. *Shambhu Dayal*[1] and *Chhuttan Lal* v. *Muhammad Ikram Khan*[2].) We observe however that in both those cases the selling officer had followed his usual practice of selling non-ancestral items first and ancestral items later. So far as we are aware, the practice in this Presidency is to sell the lots in the order in which they appear in the proclamation, and a departure from that order

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*A.A.O. Nos. 429 to 433 of 1937. 25th October, 1938.

1. A.I.R. 1931 All. 159. 2. (1933) I.L.R. 55 All. 519.

may (we do not say that in all cases it must) amount to a material irregularity.

Jalamenna *v.* Ramarao. — Burn, J.

That there has been substantial injury occasioned by the irregularity is clear since property worth not less than Rs. 5,000 has been sold for Rs. 3,000.

These appeals are accordingly dismissed. The appellant will pay the respondents' costs in A.A.O. No. 429 of 1937. We make no order as to costs in the other appeals.

In the resale we suggest to the lower Court that proper prices are more likely to be realised by sale in smaller parcels.

B.V.V. —— *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN AND MR. JUSTICE STODART.

Rani Veerammani .. *Appellant** (*1st Plaintiff*)

v.

Rajaveerabasava Chikka Royal and others .. *Respondents* (*Defendants, Plaintiffs 2 to 4*).

Veerammani *v.* Rajaveerabasava Chikka Royal.

Civil Procedure Code (V of 1908), O. 21, r. 15—Non-compliance with requirements—Irregularity—One of several decree-holders filing execution application—Petitioner acting honestly—Amendment of petition so as to include other decree-holders.

The omission in an application by one of several decree-holders for execution to mention that there are other decree-holders does not necessarily invalidate the application. Where a party has acted honestly in filing such an application the Court should not dismiss the application but should allow the party to amend the application so as to bring it in conformity with the requirements of O. 21, r. 15, Civil Procedure Code.

Ghanaya Lal v. *Madho Parshad*, A.I.R. 1931 Lah. 600 and *Dharamdeo Rai* v. *Jwala Prasad*, A.I.R. 1930 All. 188, relied on.

Appeal against the order of the Court of the Subordinate Judge of Chittoor dated 12th November, 1936 and made in E.P. No. 22 of 1936 in O. S. No. 25 of 1930.

B. Sitarama Rao for Appellant.

A. C. Sampath Aiyangar for Respondents.

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*A. A. O. No. 194 of 1937. 18th October, 1938.

Veerammani v. Rajaveerabasava Chikka Royal.

Burn, J.

The judgment of the Court was delivered by

Burn, J.—The appellant was the first plaintiff in O. S. No. 25 of 1930 on the file of the Subordinate Judge of Chittoor. There were four plaintiffs altogether and the decree passed in the suit was in favour of all of them. In E. P. No. 22 of 1936, on the 10th of February, 1936, the first plaintiff applied for execution of the decree without stating expressly that she was only one of the four decree-holders. It appears that in a subsequent suit, O. S. No. 42 of 1933 in the same Court which was a suit between the first plaintiff and the second plaintiff in O. S. No. 25 of 1930, there was a compromise by which those two persons agreed that out of the amount still due under the decree in O.S. No. 25 of 1930 the first plaintiff Rani Veerammani Garu should receive Rs. 3,000 and the balance should be taken by the third plaintiff Rani Mahadevammani Garu without any further claim by the first two plaintiffs in O. S. No. 25 of 1930. It was further declared in the decree in O. S. No. 42 of 1933 that the plaintiff be entitled to a first charge on the decree in O. S. No. 25 of 1930 to the extent of Rs. 3,000 with interest thereon and that she be entitled to execute the said decree in her own name to the said extent. It is recited in the decree that Rani Mahadevammani and Raja Mahadeva Raja Varu the third and fourth plaintiffs in O. S. No. 25 of 1930 had recorded their consent to this arrangement in the compromise petition. It is not disputed that this latter recital is correct; when the third and fourth plaintiffs did agree to the first plaintiff taking Rs. 3,000 out of the amount decreed in O. S. No. 25 of 1930.

It is not known how the Court came to pass the decree in O. S. No. 42 of 1933 in those terms because it is not possible under the provisions of O. 21, r. 15 for one of several decree-holders to execute the decree for his or her own benefit. However the decree was passed and it is quite clear that all the joint decree-holders in O. S. No. 25 of 1930 did consent to that arrangement. It cannot therefore be alleged for a moment that the first plaintiff when she filed E. P. No. 22 of 1936 was attempting to perpetrate any fraud upon the Court or upon her fellow decree-holders. The judgment-debtor in O.S. No. 25 of 1930 raised the objection that the execution petition was liable to be dismissed as it was filed only by one joint decree-holder. Notice was thereupon given to the other decree-

Veerammani v. Rajaveerabasava Chikka Royal.

Burn, J.

holders in O. S. No. 25 of 1930 and they for some unexplained reason supported the objection raised by the judgment-debtor. The learned Subordinate Judge dismissed the execution petition outright. Mr. Sitarama Rao who appears for the appellant in this Court concedes that the execution petition ought to have been filed on behalf of all the decree-holders in O. S. No. 25 of 1930 but suggests that in the circumstances the lower Court would have been well advised to allow any necessary amendments to be made in the execution petition to bring it into accord with the provisions of O. 21, r. 15. Mr. Sampath Aiyangar who appears for the third and fourth decree-holders in O.S. No. 25 of 1930 has no strong objection to raise to such permission being granted at this stage. The learned Advocate for the judgment-debtor however opposes this suggestion. He says in the first place that the appellant, as soon as the defect in the execution petition was brought to her notice, might have filed a fresh application at once in accordance with O. 21, r. 15 without pursuing the matter to the bitter end in the Subordinate Court and then preferring an appeal to this Court. He points out also that it is possible that by this time more than three years may have elapsed since the dismissal of the last prior execution petition. In that case he says that the judgment-debtor would be deprived of the plea of limitation if amendment of the execution petition were now allowed. We do not think that these considerations should prevent us from saying that the petition should be allowed to be amended now. It has been pointed out by Sir Shadi Lal, J., in the case of *Ghanaya Lal* v. *Madho Parshad*[1], that the omission in an application by one of several decree-holders for execution to mention that there are other decree-holders does not necessarily invalidate the application. The learned Chief Justice observes:—

> "O. 21, r. 15 provides that any one or more of the joint decree-holders may apply for the execution of the whole of the decree for the benefit of them all; and it is nowhere laid down that the omission on the part of a decree-holder to state in his application the names of all the persons who are interested in the decree is such a defect as would invalidate the execution proceedings."

The learned Chief Justice then refers to a case decided by a Division Bench of the Calcutta High Court in which it was

1. A.I.R. 1931 Lah. 600.

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Burn, J.

held that such an omission does not render the execution proceedings invalid. It is pointed out also in the case of *Dharamdeo Rai* v. *Jwala Prasad*[1], that

> "Although under r. 15 of O. 21 no duty has been cast upon the Court receiving the application for execution to have the defects remedied it does not follow that if any requirements of r. 15 of O. 21 have not been complied with by inadvertance or otherwise, the Court when its attention is drawn to the defect subsequently cannot allow the amendment."

We agree with the observations of the learned Judges in that case at page 190 where they observe:

> "The learned Judge has dismissed the last application on the additional ground that only one of the two decree-holders applied for execution without making it appear on the face of it that it was made for the benefit of the legal representatives of his deceased decree-holder. In taking to this course the learned Judge has allowed his mind to be influenced by too technical a consideration which is devoid of all substance and in utter disregard of the ends of substantial justice."

We think the same remarks apply here. It is quite clear, as we have already said, that the appellant was acting in perfect honesty when she applied for execution of the decree for her own benefit to the extent of Rs. 3,000. That was the arrangement which had been come to between the four decree-holders and it was not an arrangement to which the judgment-debtor could take a valid objection; he could only request the Court under O. 21, r. 15 to see that his interests were not in any way jeopardised by payment to one out of four decree-holders. This being so, we think that this appeal must be allowed and the order of the learned Subordinate Judge dismissing the execution petition set aside. The execution petition must be restored to file and disposed of according to law after allowing the appellant to amend it in order to bring it into compliance with the requirements of O. 21, r. 15. We think it is right to order that the appellant should pay the costs of all the respondents in the execution petition and in this appeal.

B.V.V. —— *Appeal allowed.*

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1. A.I.R. 1930 All. 188.

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Civil Jurisdiction.]

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE MADHAVAN NAIR AND MR. JUSTICE VARADACHARIAR.

M. S. S. Chidambaram Chettiar and another .. *Petitioners**

v.

The Commissioner of Income-tax, Madras having his office at the Old High Court Buildings .. *Respondent.*

F.B.

Chidambaram Chettiar *v.* Commissioner of Income-tax, Madras.

Income-tax Act (XI of 1922)—Firm—Taking over immovable property for debts due—If can be taken into account in computing profits.

Where a firm was compelled to take over in satisfaction of debts due to it immovable properties which had been mortgaged as security for the debts, the Income-tax Officer in computing the profits available for assessment can take that into consideration. The assessee cannot be allowed to withdraw money from the firm and treat their interest in the immovable properties of the firm as representing their profits. The withdrawals from the firm must therefore be treated as withdrawals of profits. The effect was to turn the immovable properties representing such profits into capital assets.

Scottish Provident Institution v. *Allan*, (1903) 4 Tax Cases 591, followed.

P. R. Srinivasan for Petitioners.

M. Patanjali Sastri for Respondent.

The judgment of the Court was delivered by

Leach, C. J.

The Chief Justice.—This reference arises out of an assessment of an undivided Hindu family the members of which are M. S. S. Chidambaram Chettiar and Meyappa Chettiar. The assessees are partners in various money-lending firms in the Federated Malay States and in Burma, and carry on the same kind of business at Karaikudi where they have their head-quarters. One of their foreign firms does business at Ipoh in the Federated Malay States. Owing to the financial depression which existed there this firm was compelled to take over in satisfaction of debts due to it immovable properties which had been mortgaged as security for debts. The values of these immovable properties were treated as representing in part the return of capital and in part profits. The total profits of the firm were calculated and it was found that they amounted to $1,27,806 of which $74,570 was represented

* O. P. No. 176 of 1937. 1st November, 1938.

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Chidambaram Chettiar v. Commissioner of Income-tax, Madras.

Leach, C.J.

by land. The assessees' share in the sum of $74,570 was $53,264. During the year of account (1933-34) the assessees remitted from Ipoh to Rangoon, which was then in British India, sums amounting in the aggregate to Rs. 99,279. These remittances the Income-tax authorities treated as being remittances of profits. The assessees objected to this, their objection being that the profits represented by immovable properties were not capable of remittance. The Court directed the Commissioner of Income-tax under S. 66 (3) of the Act to refer the following question for decision:—

"The total profits of the assessees for the years 1930-31 to 1933-34 having been found to be $1,19,647 of which $74,570 represents immovable properties taken over by the assessees from their debtors, should the Income-tax Officer in computing the profits available for remittance from the Ipoh firm have excluded the sum of $74,570?"

The Commissioner of Income-tax rightly points out that there is an error in the wording of the question. The sum of $74,570 was the total interest of the firm in immovable properties, and the assessees' share, as I have already said, was only $53,264.

In our opinion the question referred must be answered in the negative. The assessees cannot be allowed to withdraw money from the firm and treat their interest in the immovable properties of the firm as representing their profits. They accumulated profits to the extent of $1,19,647 and out of the common funds of the firm they made the remittances. The withdrawals from the firm must therefore be treated as withdrawals of profits. The effect was to turn the immovable properties representing such profits into capital assets. The case comes within the principle stated by the House of Lords in *Scottish Provident Institution* v. *Allan*[1].

As the answer is against the assessees they must pay the costs of the Commissioner of Income-tax, Rs. 250.

S.V.V. *Reference answered against the assessee.*

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1. (1903) 4 Tax Cases 591.

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Madras.]

PRESENT:—LORD ATKIN, LORD MACMILLAN, LORD PORTER, SIR LANCELOT SANDERSON AND SIR GEORGE RANKIN.

The Commissioner of Income-tax, Madras .. *Appellant**

v.

Diwan Bahadur S. L. Mathias .. *Respondent.*

P.C.

Commissioner of Income-tax, Madras *v.* Mathias.

Income-tax—Foreign income—Coffee grown outside British India—Green coffee cured and then sold in British India—Proceeds retained there—Whether income accruing within British India—Whether exempt from tax—Income-tax Act (XI of 1922), S. 4.

The assessee was the owner of and worked coffee estates in the Mysore state outside British India, maintaining an office on the estates for the supervision of the labour which he employed in respect of them. At a place within British India he recruited most of the labour and purchased materials and equipment which he had sent from there to the estate. The crops were brought to that place within British India in their raw state, and he had the raw coffee cured for payment within British India where also he sold it through his agents and realised and retained the proceeds He kept a separate staff in British India for the operations which he conducted there. All the operations connected with the cultivation of the coffee plants and the collection, transport and sale of produce were controlled from within British India and the accounts were incorporated in a consolidated profit and loss account kept in British India. The assessee contested an assessment made upon him on an income which was computed as his profits from the said business of growing, curing and selling coffee for profit.

Held, that the assessee was carrying on a "business" within the meaning of Ss. 2 (4) and 10 of the Act in as much as the profit which he derived from his land was derived from the business. It was impossible to regard the green coffee itself as income within the meaning of the Act, or arbitrarily to divide into two parts the business operations, which must be regarded as a whole.

Held, further, that assuming that the assessee's income had accrued without British India and the second proviso to S. 4 (2) was applicable, the assessee must in any case be held liable to tax under S 4 (1), by reason of the fact that the income was received by him originally, and as income in British India and that no part of the income in question was exempt from taxation by virtue of the second proviso to S. 4 (2) of the Act.

Income-tax Commissioner, Bihar and Orissa v. *Maharajadhiraj of Darbhanga*, (1935) 69 M.L.J. 474: L. R. 62 I.A. 215: I L.R. 14 Pat. 623 (P.C.), distinguished.

Decision of the Madras High Court reversed.

Appeal from a decision of the High Court, Madras, dated 29th April, 1937 [reported in (1937) 2 M.L.J. 310 (S.B.)] (Beasley, C. J., Varadachariar and King, JJ.) on a reference to it under S. 66 of the Indian Income-tax Act, 1922, by the Western Range Assistant Commissioner who had

* P.C. Appeal No. 16 of 1938. 18th November, 1938.

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upheld an assessment to income-tax made by the Income-tax Officer, Mangalore.

J. Millard Tucker and *Hubert Hull* for Appellant.—The fundamental point is that the production and sale of coffee carried on by the respondent is a "business" within the meaning of Ss. 6 and 10 of the Income-tax Act. The assessee's operations must be regarded as an indivisible whole and it is impossible to divide them into two by treating the operations carried on in Mysore as one business, and the marketing operations carried on in Mangalore as another. That the whole of the operations are linked together can be seen when the exact constituents of the profit are examined. The respondent's profit in his business is the difference between the price which he receives for a lot of coffee and the total costs incurred by him in producing that lot, making it ready for market, and actually marketing it; so that the costs to be deducted in arriving at the profit include costs of operations carried on in British India. The price of each lot of coffee sold was received by the respondent in Mangalore for the first time, and so much of that price as represented his profit was therefore also first received in British India. S. 4 (1) of the Act of 1922 imposes liability to tax on residents in respect of any income received in British India irrespective of where the income accrued and the purpose of S. 4 (2) is primarily to extend the liability to tax to those who are not covered by S. 4 (1). The exemption given by the second proviso to S. 4 (2) is strictly limited to agricultural income, and, the "income from agriculture" there mentioned must not only accrue from land in a state outside British India, but must also arise or accrue in that state where the land is. But here the profits arose or accrued when the coffee was sold, and that took place in Mangalore. If it be conceded that the raw coffee itself is to be treated as part of the profits of the business and as having accrued or arisen to the respondent outside British India, nevertheless the fact that the processing and subsequent sale takes place in British India has the effect of causing a part at least of the total profit to be received in British India, and that part is accordingly liable to tax. That part can quite well be ascertained, for it is constituted by the difference between the price actually received for the coffee and its market value on arrival at Mangalore, with deduction of the cost of processing and sale.

R. P. Hills for Respondent.—The profit which is arrived at by deducting expenses from the proceeds of selling coffee which the respondent has grown on his land can only be "income from agriculture" within the meaning of S. 4 (2), second proviso. It is not disputed that the estates where the coffee was grown are land in a State in India for which an annual payment is made to that

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State. So, the respondent being resident in British India, his income is exempted by the proviso in question; and that result is entirely in accord with the clear purpose of the Legislature in enacting the proviso. S. 4 (2) itself comprehends income such as that in question, and one cannot go beyond the effect which the proviso contained in the sub-section has of excluding this income entirely from taxation. S. 4 (1) and (2) must be read together, and if a certain profit is found to come within sub-S. (2) and to be exempted by the second proviso in it, that profit cannot be made liable to tax by reference to sub-S. (1), which is for this purpose excluded. A review of the facts shows that no material process of manufacture was applied to the coffee beans in British India. The income represented the value in the market of the coffee beans as having been grown, harvested and treated upon the respondent's coffee-growing estates outside British India. It cannot be successfully contended that this income is other than "income from agriculture". But in any event, a part of the profit in question must be represented by the value of the beans purely as having been grown, harvested and treated on the respondent's estates. That part of the profit was "income from agriculture" and, as such, entitled to the exemption conferred by the second proviso to S. 4 (2).

18th November, 1938. Their Lordships' judgment was delivered by

Sir George Rankin.

SIR GEORGE RANKIN.—This appeal is brought by the Commissioner of Income-tax, Madras, from a judgment of the High Court at Madras upon a reference made under the provisions of S. 66 of the Indian Income-tax Act, 1922. The year of assessment in respect of which the dispute arises is 1934-35, and the year of account or "previous year" is that which ended on the 30th April, 1933. The assessee respondent resides at Mangalore in British India and owns coffee estates in the Mysore State, which is no part of British India. The Income-tax Officer at Mangalore assessed him to tax on a "total income" of Rs. 29,160, of which Rs. 25,963 was computed as the assessee's profits of a "business" of growing, curing and selling coffee for profit. By appeal to the Assistant Commissioner, the assessee disputed his liability in respect of any part of the sum of Rs. 25,963, and on his appeal being dismissed required the Commissioner to make a reference to the High Court. An agreed question having been stated and referred (24th July, 1936), in terms to be presently mentioned, the High Court

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decided in favour of the assessee, holding that the whole income derived by the assessee by the sale of the produce of his coffee estates was exempt from taxation. From the joint judgment* (dated the 29th April, 1937), of Beasley, C.J., Varadachariar and King, JJ., this appeal has been brought pursuant to a certificate granted by the High Court on the 13th October, 1937.

There is no dispute as regards the material facts, and the figure (Rs. 25,963) determined by the Income-tax Officer as the amount of net profit is not in itself in dispute as a question of amount. In arriving at this figure deduction has been made from the proceeds of sale for all expenses incurred, whether in or outside British India.

The Commissioner's statement of the facts is as follows:—

"The Petitioner owns two coffee estates in the Mysore State for which he pays land tax to that State. These estates are worked by the Petitioner. He employs the labour required for the purpose and maintains an office in the estate in order to supervise them. The labour is recruited mainly at Mangalore and the manure, spray materials, tools, crop-bags, etc., required for the estate are purchased by the Petitioner at Mangalore and are sent to the estate. The crops are harvested by the labour employed by the Petitioner and are then brought to Mangalore in their raw state. There is no ready market for raw coffee. The Petitioner gets the green coffee cured at Mangalore by persons owning curing factories, on payment of a commission to them. The cured coffee is insured against fire till sale and the Petitioner pays the insurance charges. It is then sold at Mangalore by the Petitioner's selling agents, Messrs. Pierce Leslie & Co., Ltd., and the sale-proceeds are realised and retained there. A separate staff is maintained at Karkal in the Mangalore District for the various operations conducted in Mangalore. The accounts are written up by the estate staff in Mysore in respect of the expenses incurred in Mysore and by the Karkal staff in respect of the expenses incurred in Mangalore and in respect of the receipts. All the operations connected with the cultivation of the coffee plants and the collection, transport and sale of produce are controlled by the Petitioner from Mangalore The result of the accounts in Mysore is incorporated in the books maintained at Karkal and a consolidated profit and loss account is made there. The income from this source was assessed under the head 'business' in the past."

On these facts the assessee's liability depends upon S. 4 of the Act (XI of 1922), on its true construction, and the manner in which it is to be applied to his case. As it stood at the time of this assessment (1934) and still stands, it reads as follows:—

"S. 4.—(1) Save as hereinafter provided, this Act shall apply to all income, profits or gains, as described or comprised in S. 6, from whatever source derived, accruing or arising, or received in British India or deemed under the provisions of this Act to accrue, or arise, or to be received in British India.

"(2) Income, profits and gains accruing or arising without British India to a person resident in British India shall, if they are received in or brought

* (1937) 2 M.L.J. 310 (S.B.).

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into British India, be deemed to have accrued or arisen in British India and to be income, profits and gains of the year in which they are so received or brought notwithstanding the fact that they did not so accrue or arise in that year:

"Provided that nothing contained in this sub-section shall apply to any income, profits or gains so accruing or arising prior to the 1st day of April, 1933, unless they are income, profits or gains of a business and are received in or brought into British India within three years of the end of the year in which they accrued or arose:

"Provided further that nothing in this sub-section shall apply to income from agriculture arising or accruing in a State in India from land for which any annual payment in money or in kind is made to the State,

"EXPLANATION.—Income, profits or gains accruing or arising without British India shall not be deemed to be received or brought into British India within the meaning of this sub-section by reason only of the fact that they are taken into account in the balance sheet prepared in British India.

"(3) This Act shall not apply to the following classes of income:—

* * * *

"(viii) Agricultural income."

Upon this section the assessee contended (1) that his income from coffee was not assessable as profits of a business; (2) that it was within the second proviso to sub-S. (2); (3) that if any income was assessable under sub-S. (1) it was only the residue left out of the sale proceeds after deducting the market value of the green coffee and the curing and other charges. The question of law upon which the parties were at issue was ultimately stated to the High Court in an agreed form as follows:—

"Whether any part of the income derived by the petitioner from the produce of his coffee estates in Mysore is exempt from taxation under the second proviso to S. 4 (2) of the Indian Income-tax Act as being income that has accrued or arisen outside British India?"

The High Court was of opinion that the income in question was "income from agriculture", and that it arose or accrued in Mysore. "Whatever may be said as to 'profits' or 'gains', the view that '*income* from agriculture' can be said to arise or accrue only when and where the produce is sold and converted into money seems to us, with all respect, difficult to reconcile with the reasoning in *Commissioners of Taxation* v. *Kirk*1. The learned Judges speak of that decision as recognising "that as a matter both of language and of business receipt of produce *in kind* may well be spoken of as receipt or accrual of income at the place where the produce is received". To the contention

1. (1900) A.C. 588.

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that, even so, the money income had been "received in British India" within the meaning of sub-S. (1) as in the *Pondicherry Railway Co. case*1, the learned Judges replied that sub-S. (1) comprises receipts falling under sub-S. (2) as well, and that it was not necessary or reasonable to read the two sub-sections as mutually exclusive. Hence, on the footing that the income was received within the meaning of sub-S. (1), they considered that the second proviso to sub-S. (2) applied to exempt it. Finally, they held that the exemption to which the assessee was entitled under this proviso was of the same scope as the exemption of "agricultural income" as defined in S. 2 (1) of the Act. Finding that the process applied to the coffee beans after they are picked was only a process "ordinarily employed by the cultivator to render the produce fit to be taken to the market" (as described in the definition of "agricultural income" given by S. 2, sub-S. (1) (*b*) (ii) of the Act), they held that the assessee was entitled to exemption "in respect of the whole price realised by the sale of his coffee."

Having regard to the assessee's contention that he was not conducting any business in coffee and to certain observations made by the learned Judges of the High Court, it is necessary to state expressly their Lordships' opinion that the assessee is carrying on a "business" within the definition of the word given by S. 2, sub-S. (4) and within the meaning of S. 10 of the Act. The observations of the Commissioner in his letter of reference are justified: "Such profit as the petitioner in this case derives from his possession of land in Mysore is derived by means of a business: and the fact that agricultural operations form an element in the business does not render it any the less a business." On the other hand, the mere circumstance that income is to be placed under the head "business" has no effect to negative its being "agricultural income" as defined by S. 2 (1) or "income from agriculture" under the second proviso to S. 4 (2). But the green coffee itself cannot be regarded as income, profits or gains within the meaning of the Act: it is grown for purposes of sale and in order that profit may be earned. The business operations cannot be arbitrarily cut into two portions but must be regarded as a whole. Thus, if the coffee market may be assumed to have its ups and downs, the assessee, if he delayed his sales in expectation of a rise but

1. (1931) 61 M.L.J. 251: L.R. 58 I.A. 239: I.L.R. 54 M. 691 (P.C.).

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found that prices fell, would not expect to be charged to tax on the profits that he would have made had he sold without delay. On the other hand, upon the question whether the profits and gains accrued or arose in British India, it may be that the fact that the coffee was grown in Mysore is by no means to be disregarded notwithstanding that it was sold in British India, especially if it be true that it was sold without further process of a manufacturing character. For the moment it is enough to say that it may be so, without examining the matter and without prejudice to either view. The High Court, in holding that the assessee's business income arose in Mysore, placed much reliance upon *Kirk's case (supra)*, and considerable argument was addressed to the Board upon the matter. But it appears to their Lordships that other considerations decide this appeal, and that it is unnecessary to determine whether the income in question accrued or arose within or without British India. Accordingly they express no opinion as to the light, if any, thrown upon the phrase "accruing or arising in (a country)" by the decision in *Kirk's case* upon the phrases "earned in (a country)" and "arising or accruing from (a trade, land, a source)"—a matter upon which the High Court in the present case differed in opinion from the High Court at Calcutta (*Mohanpur Tea Company's case*[1]).

The contention of the Income-tax authorities has been throughout that the income assessed to tax was not within sub-S. (2) of S. 4 because it did not accrue or arise outside British India. But in the High Court it was pointed out that the income was received in British India as the proceeds of all sales were paid to the assessee in Mangalore and so much of the price as represented profit was there received for the first time. It was contended, therefore, that the assessee was liable under sub-S. (1) of S. 4, and that sub-S. (2) and its proviso did not affect the assessee's liability. The answer given by the High Court has been stated and is now to be examined. But, as the section has from time to time been altered by the legislature in view of rulings of the Courts, it is legitimate, and it will be convenient to consider its history, though its present wording will *prima facie* determine its meaning completely, being intended to state with exactness the test of liability.

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1. I.L.R. (1937) 2 Cal. 231.

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The Indian Income-tax Act of 1918 contained no clause corresponding to the second sub-section of the present S. 4; but S. 3 (1) of 1918 was similar to the present S. 4 (1) as hereinbefore set out. It was as follows:—

"3.—(1) Save as hereinafter provided. this Act shall apply to all income from whatever source it is derived, if it accrues or arises or is received in British India, or is, under the provisions of this Act, deemed to accrue or arise or to be received in British India."

When the Act of 1922 was passed the section was revised and expanded—a new sub-section being introduced together with an explanation thereof. This new sub-section applied only to the profits or gains of a business, and had no effect upon income under any of the other "heads of income" (*cf.* S. 6). It read:—

"4.—(1) Save as hereinafter provided, this Act shall apply to all income, profits or gains, as described or comprised in S. 6, from whatever source derived, accruing, or arising, or received in British India, or deemed under the provisions of this Act to accrue, or arise, or to be received in British India.

"(2) Profits and gains of a business accruing or arising without British India to a person resident in British India shall be deemed to be profits and gains of the year in which they are received or brought into British India, notwithstanding the fact that they did not so accrue or arise in that year, provided that they are so received or brought in within three years of the end of the year in which they accrued or arose.

"EXPLANATION.—Profits or gains accruing or arising without British India shall not be deemed to be received or brought into British India within the meaning of this sub-section by reason only of the fact that they are taken into account in the balance sheet prepared in British India."

In the following year, however, 1923, the second sub-section was amended to read as follows:—

"4.—(2) Profits and gains of a business accruing or arising without British India to a person resident in British India shall, if they are received in or brought into British India, be deemed to have accrued or arisen in British India and to be profits and gains of the year in which they are so received or brought, notwithstanding the fact that they did not so accrue or arise in that year, provided that they are so received or brought in within three years of the end of the year in which they accrued or arose."

In 1933 the second sub-section was again revised, and put into the form already set forth as governing the present case. In its new form it applies to all income, profits and gains, and not merely to those of a business, and the provision limiting its effect to income received in or brought into British India within three years of accrual was omitted with a conditional saving in this respect for past income (that is, income accrued before the 1st April, 1933), which retained its previous immunity unless it

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was business income within the three years' limit. At the same time the second proviso was introduced upon which the assessee is now relying.

The occasion for, and, to some extent, the explanation of, the second sub-section in its original formis to be seen in decisions of the Courts upon the word "received" as it appeared in the first sub-section of S. 3 of 1918. These decisions were to the effect that if income had been received by the assessee outside British India it could not be again received by him within the meaning of the first sub-section. [*Sundar Das* v. *Collector of Gujrat*,[1] *Board of Revenue* v. *Ripon Press*[2] (cases under the Act of 1918), *Sir Ali Imam's case*[3] (under the Act of 1922 but not a case of "business" profits).] The view taken was that the same sum could not be received a second time as income. There was a further difficulty or discrepancy under the earlier forms of the section if the income of one year was brought into British India in a later year. The result was that under sub-S. (1) income could only be taxed on the ground of having been received in British India if it was income of the year of account originally received in British India. It will be observed that the various amendments leave the principle of the decisions above-mentioned untouched so far as concerns non-residents. Their general effect is to widen the liability of residents in respect of what they receive in British India by extending it to sums not received for the first time. But non-residents do not become chargeable by reason of monies having been brought into the country, if originally received abroad.

The question to be answered is whether the second proviso to sub-S. (2), assuming it to apply and the assessee's income to have accrued to him in Mysore, is any answer to an assessment made on him under sub-S. (1) by reason of the fact that the income was received by him originally and as income in British India in the year of account.

If the central words of sub-S. (1) be considered first—income accruing or arising or received in British India—it is clear that all three expressions must be applicable to the great bulk of the incomes of inhabitants of British India. It may be taken that all three expressions would not have been used unless

1. (1922) I.L.R. 3 Lah. 349 (F.B.).
2. (1923) 44 M.L.J. 523: I.L.R. 46 M. 706 (F.B.).
3. 1 I.T.C. 402.

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it was thought that they exhibited some variation in meaning and that a case might possibly arise which would come under one only of the three. If on a question as to the exact meaning of "accruing" it were to be suggested that this only means "received", it would be reasonable to object that this can hardly be correct even though the difficulty of distinguishing between "accruing" and "arising" may be great. In this sense, perhaps not a very important sense, the expressions are antithetical. But it is very plain that there is here no question of a complete disjunction or of the presentation of three mutually exclusive qualifications. No one would go about to prove that income was not received in British India by establishing that it arose or accrued there. When in sub-S. (2) income "received in or brought into" British India is put into the class of "income accruing or arising", this does not at first sight suggest that such income, if within the word "received", is thereby excluded from it in sub-S. (1). The circumstances and context do not assist to carry any such negative implication. For that, there would seem to be required some words to the effect that it "shall be charged to tax as such and not otherwise". Still, no doubt, a draughtsman even at his fourth attempt may not succeed in saying quite as much as he means. Other indications must be carefully considered. If the exact language of the second proviso be examined with any care, it must appear that if nothing in sub-S. (2) is to apply to the income of the assessee he can hardly rely upon sub-S. (2) to take his case out of sub-S. (1). No doubt, had it been expressly stated, or if it be held or assumed, that in the case of a resident income received in British India is never to be charged as such but only as having "accrued or arisen" it might become necessary to read the second proviso as meaning only that sub-S. (2) should not apply to charge it. Even so, however, the language of the proviso is a second difficulty in the assessee's contention, which involves both that in the main clause of the sub-section the legislature has said less than it meant and that in the proviso it must be taken to have meant less than it said—if not, indeed, something different in kind. A third consideration must be allowed effect as a matter of construction. The question is entirely concerned with the result for purposes of tax of income having been "received in or brought into" British India. Had the assessee not been a resident he would have had no answer

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whatever to the present claim. But it is said that he escapes because he is a resident and comes as such within sub-S. (2). This is to invert the intention of the sub-section, which is to make receipt impose liability on the resident in some cases where the non-resident would go free. There is nothing whatever in sub-S. (2) as it now stands, or as it stood in 1922 and 1923, to relieve the resident from any liability which the non-resident is under. Hence, the correct meaning of the proviso may well be the meaning which is intended—namely, that the widening of liability shall not attach to the incomes therein mentioned.

It is right to consider whether S. 4 can be interpreted more favourably to the assessee on the footing that his income is of a class which is assimilated to "agricultural income" in British India. But unless it can be assumed as plain (despite much argument in the present case) that income from cultivating land in an Indian State can never accrue or arise in British India, it is at least clear that in some cases the agriculturist is not exempt at all. Again, the agriculturist in an Indian State whose income in the narrow sense of sub-S. (1) is received in British India is not the ordinary agriculturist of his State. Nor does the typical agriculturist of Mysore reside in British India. The legislature may or may not have thought it to be advisable and sufficient that such a person should be relieved of the extended liability attached by sub-S. (2) to the fact of receipt in British India without relieving him of the same liability under sub-S. (1) as non-residents undoubtedly incur.

It is said, however, that the second proviso gives the assessee exemption; hence no other provision of the Act can be construed to render him liable. But what is the exemption given? There can be no general presumption that exemption from the provisions of a sub-section is intended as complete exemption from the tax. The distinction is between exempting a class of income in some events and exempting it in all events. The case of *Income-tax Commissioner, Bihar and Orissa* v. *Maharajadhiraj of Darbhanga*[1] was a case of "agricultural income" to which the Act does not apply [S. 4 (3) (viii)]. "The exemption is conferred, and conferred indelibly, on a particular kind of income and does not depend on the character

1. (1935) 69 M.L.J. 474: L.R. 62 I.A. 215: I.L.R. 14 Pat. 623 (P.C).

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of the recipient" [per Lord Macmillan at page 223]. The proviso now in question is not rendered otiose or even unimportant by the assumption that its opening words are a correct expression of its intention.

Their Lordships have reached the conclusion that upon this question the meaning and intention of the legislature is yielded by a strict construction of S. 4 according to its language, and that any departure therefrom which can be suggested in favour of the assessee appears upon a full consideration to be unjustified. The assessee must be held liable to tax under sub-S. (1) of S. 4.

The answer proper to be given to the question stated by the Commissioner is that no part of the income therein mentioned is exempt from taxation under the second proviso to S. 4 (2) of the Indian Income-tax Act.

Their Lordships will humbly advise His Majesty that this appeal should be allowed and that the question referred to the High Court should be answered as above mentioned.

As the contention upon which the appeal has succeeded was not formally raised in the letter of reference, though it was mooted in argument before the High Court and dealt with by the judgment, there will be no order as to the costs of this appeal, but the High Court's order as to costs will be set aside and each party will bear its own costs in the High Court.

Solicitors for Appellant: *The Solicitor, India Office.*

Solicitors for Respondent: *Lambert & White.*

R.C.C. — *Appeal allowed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Lahore.]

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Firm of Gokal Chand-Jagan Nath v. Firm Nand Ram Das-Atma Ram.

PRESENT:—LORD WRIGHT, LORD ROMER, LORD PORTER, SIR SHADI LAL AND SIR GEORGE RANKIN.

The Firm of Gokal Chand-Jagan Nath .. *Appellants**

v.

Firm Nand Ram Das-Atma Ram .. *Respondents.*

Principal and agent—Commission agent—Transactions carried out with third parties—Third party financially embarrassed—Discretion as to recovery of money due to principal—Whether principal entitled to sue agent to recover balance owing from third party—Procedure—Judgment of appellate Court—

* P. C. Appeal No. 133 of 1936. 21st October, 1938.

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Firm of Gokal Chand-Jagan Nath v. Firm Nand Ram Das-Atma Ram.

Departure of Judge on leave before signing judgment delivered by him—Irregularity—Code of Civil Procedure (Act V of 1908), O. 41, r. 31.

The duty of an agent, in a case where a third party, as the result of a transaction between him and the principal negotiated on behalf of the latter by the agent, has become indebted to the principal, is to do his best to collect all the money that he can in the circumstances, and he is entitled to exercise his discretion in deciding that it is more prudent to take what he can in cash at the moment, and give the third party time for payment of the balance.

The plaintiffs employed the defendants to conduct transactions for the purchase and sale of certain commodities. The defendants executed such transactions with three parties, the transactions all closing with balances due from those parties to the plaintiffs, the principals. Each of the third parties was in financial difficulties. The defendants as commission agents had in the ordinary course in each case conducted the transactions in their own name, and taken a settlement from the third party for the whole balance of the account between them and that party, themselves apportioning that total sum between the different creditors including the plaintiffs. The plaintiffs having sued the defendants to recover the balances outstanding to them from the third parties,

Held, that the defendants' duty as agents to the plaintiffs as their principals was to exercise due skill and care and judgment in recovering what money they could, and that the plaintiffs had failed to discharge the burden which lay on them of proving that the defendants had failed in that duty. The case was not one in which the agent's authority was presumptively only to settle in cash in respect of transactions with third parties, or in which the agent had given up any valuable right or thing which he should not have given up except against cash.

Blumberg v. *Life Interests and Reversionary Securities Corporation*, (1897) 1 Ch. 171; *Williams* v. *Evans*, (1866) 1 Q.B. Cas. 352 and *Pape* v. *Westacott*, (1894) 1 Q.B. 272, distinguished.

O. 41, r. 31, Civil Procedure Code, does not say that if its requirements are not complied with the judgment shall be a nullity, neither does it state any definite time within which it is to be fulfilled, the time being left to be defined by what is reasonable. The rule from its very nature is not intended to affect the rights of parties affected by a judgment. It is intended to secure certainty in the ascertainment of what the judgment was. Where an appellate judgment of the High Court was delivered by one Judge, the other agreeing and the former Judge went on leave before signing the judgment, which was signed by the second Judge.

Held, that the defect in rendering the judgment was merely an irregularity which the Court had an inherent jurisdiction to cure and that the difficulty was in any case disposed of by Ss. 99 and 108 of the Civil Procedure Code.

Decision of the Lahore High Court affirmed.

Appeal from a judgment and decree of the High Court, Lahore, dated 22nd February, 1933 (Harrison and Agha Haider, JJ.), substantially reversing a decision dated 31st May, 1926, of the Senior Subordinate Judge, Sialkot.

C. S. Rewcastle, *K.C.* and *Dingle Foot* for Appellants.—The respondent agents are liable to the appellants for the sums due to the latter from the third parties if only because their failure to

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Firm of Gokal Chand-Jagan Nath v. Firm Nand Ram Das-Atma Ram.

realise the debts due from the third parties is the result of negligence on the respondents' part. The third parties having turned out to be in financial embarrassment, the respondents failed to exercise the degree of skill and care which was required of them in the circumstances, and which the appellants were entitled to expect. The respondents are liable for the whole of the amount still due from the third parties, on the ground, further, that it was their duty, as it generally is the duty of an agent, to receive cash in settlement of the transactions. The respondents were not entitled to give credit without receiving from their principals express instructions to do so. Counsel referred to the English authorities showing that an agent's duty is by presumption to settle in cash.

S. P. Khambatta for Respondents.—The appellants have fallen far short of proving that the respondents have been guilty of any negligence in this matter. It is submitted, on the contrary, that the facts establish that the respondents, in the exercise of a discretion which was theirs, have acted reasonably and to the best of their ability in making the best possible bargain in the circumstances to ensure ultimate repayment. The agents have acted throughout reasonably and properly, nor was their authority limited only to effecting cash settlements. In those circumstances there was a burden on the principals of proving negligence in the agents, which burden they have failed to discharge.

21st October, 1938. Their Lordships' judgment was delivered by

Lord Wright.

LORD WRIGHT.—The appellants are a firm of merchants carrying on business at Sialkot. The respondents are a firm of commission agents in Calcutta, who, from between 1919 and 1922, were employed by the appellants to conduct transactions for the purchase and sale of sugar and the purchase of gunny bags. The question in this appeal relates to three transactions executed by the respondents on behalf of the appellants in accordance with this course of business. These transactions were duly closed by the respondents with the other parties, and in the result three sums of money were respectively due on the balance of the transactions from Diwan Chand-Amar Chand, Rs. 1,275, from Chatter Bhuj Dossa Rs. 8,670, from Kalu Ram Kanhaya Lal Rs. 510. This was the position when the transactions were closed in October, 1920. But the three parties were in financial difficulties, and in the result the respondents succeeded in obtaining payment of a part only of this

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indebtedness. This action was brought to recover from the respondents the differences between the sums due from the third parties and the sums of indebtedness set out above. The largest debtor was the firm of Chatter Bhuj Dossa, from whom in the result when the firm became insolvent in May, 1922, there was still a considerable sum outstanding. The respondents had taken hundis on account in March, 1921, and renewals in October, 1921, but no cash payment had been obtained save Rs. 764-15-3. The hundis which were taken were in the respondents' favour, and included sums other than those due in respect of the transactions conducted for the appellants. The respondents as commission agents had in the ordinary course in each case conducted the transactions in their own name and taken a settlement from the third party for the whole balance of the account between them and that party, themselves apportioning that total sum between their different constituents, including the appellants. The appellants, for whom they had acted on that account, were not consulted before the hundis were taken, nor did they give any express authority to the respondents to accept hundis. The claim in the action was to recover the outstanding balance due to the appellants from the third parties, after giving credit in reduction for money actually recovered and paid over to the appellants by the respondents. The course of business in regard to the other two firms was the same, save that in their cases the debts for the balance became ultimately time-barred.

The Subordinate Judge held that the respondents were liable to pay to the appellants the sums not recovered from the third parties, on the ground that the respondents, as agents, in giving credit to the third parties instead of recovering money from them, did so at their risk, especially if the third parties' financial position was shaky, and were therefore answerable to the appellants as their principals for the amounts of the debts ultimately not recovered. In other words, he held that the agent was liable for the loss accruing to the principal by the insolvency of the debtor to whom he had given long credit. He also dealt with questions of interest and other matters of account. From this judgment appeal was taken to the High Court. That Court reversed the judgment of the Subordinate Judge, apart from questions of interest, to which reference will be made later.

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The High Court were unable to accept the statement of principle which has been quoted above as the principle on which the Subordinate Judge proceeded. In their opinion, the true principle was that the duty which the respondents as agents owed to the appellants their principals was to exercise due care, skill and judgment in getting in what they could by making the best bargain possible under the circumstances. The Court held that in the present case it was for the appellants as plaintiffs to prove that the respondents as defendants had failed in that duty, and had been guilty of negligence, and that they had failed to do so. On the contrary the Court held on the evidence that it was established that the respondents did all that was reasonably possible, and that it was no fault of theirs that the realisations were not larger than they were. They accordingly varied the judgment of the Subordinate Judge by reducing the decretal amount to Rs. 5,919-8-3, which represented the money actually collected by the respondents in respect of the three debtors, together with interest from the date of the institution of the suit until payment at 6 per cent. per annum.

Their Lordships are in agreement with the High Court as to the principles to be applied. They have also considered the evidence in the case and are of opinion that the conclusions of fact arrived at by the High Court are fully justified. On the question of principle, their judgment is that the case in question depends on determining what is the duty of an agent in a case where the third party, debtor to the principal, is financially embarrassed. His duty then, in their judgment, is to do his best to collect all he can in the circumstances. It may be that it is more prudent not to press the debtor into immediate bankruptcy, but to take what he can in cash at the moment and to give time for the balance. This is what the respondents did in this case. They recovered a substantial amount of the indebtedness, and there is no evidence that they could have recovered more. The evidence is that they could not. The appellants' counsel have strenuously contended that the respondents are liable for the whole amounts eventually left outstanding, on the ground that an agent is in general bound to receive cash in settlement of debts due to his principal, and has no right to give credit without express instructions from his principal, whereas in the present case the appellants gave no such instructions, and the respondents did not even ask for instructions

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until a later date after they had accepted the hundis. On this point it is retorted that the appellants took no notice of this request for instructions. But apart from that their Lordships are of opinion that the propositions relied on by the appellants are not applicable to a case like this. There are various authorities to the effect that an agent's authority is, at least presumptively, to settle in cash, in the absence of express authority to the contrary effect or of an authority by custom or usage. Thus in *Blumberg* v. *Life Interests and Reversionary Securities Corporation*[1], the question was whether a valid tender of mortgage money had been made; it was held that it had not because it had been made by cheque, which was not a good tender. Again, in *Williams* v. *Evans*[2], it was held that a purchaser at an auction sale could not claim that he had paid the purchase price as against the seller, when he had purported to do so by giving a bill of exchange to the auctioneer; that was no payment to discharge the purchaser as against the seller. Similarly, in *Pape* v. *Westacott*[3], an agent was held liable for parting with a licence against a cheque which was dishonoured, whereas he was only authorised to do so against cash. It is not necessary to multiply authorities on this point. But the position here is very different. This is a case where, the debtor being in financial difficulties, the agent gets all the cash he can and does his best to secure cash for the residue of the debt, thinking it best to give the debtor some time to pay. There is not here any question of an authority limited to receiving cash, nor is the agent giving up any valuable thing or right which he should not have given up save against cash. In fact his duty is to do the best he can to get cash. The onus is on the plaintiff in such a case to prove that the agent has failed in that duty and that the plaintiff has suffered damage, which he can only do by showing that the agent could have realised more cash in the circumstances of the case than he actually did. The onus is on the plaintiff to prove the breach of duty and the damage. An old case, *Russell* v. *Palmer*[4] illustrates that principle. The defendant was an attorney who, by his negligence, had failed duly to charge a judgment-debtor in execution, so that he was released from the prison in which he was held in respect of the debt. It was decided that the

1. (1897) 1 Ch. 171. 2. (1866) 1 Q.B. Cas. 352.
3. (1894) 1 Q.B. 272. 4. (1767) 2 Wils. K.B. 325: 95 E.R. 837

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defendant was not liable for the whole debt but only for such part of it as might have been realised by execution, because the action sounded only in damages. So in the present case the respondents did not become guarantors of the debts on the debtors' insolvency. They could only be made responsible for the debts to the extent that it could be established (1) that they were negligent in seeking to realise them and (2) that loss resulted to the appellants from that negligence. Their Lordships agree with the High Court that the appellants have failed on both points.

A subsidiary question was raised about the interest claimable on the sums actually received. The High Court awarded interest from the institution of the suit, whereas the appellants have claimed that they are entitled to interest from the date of the demand, which was the 22nd July, 1922, the date of the institution of the suit being the 9th May, 1923. The amount involved is trifling and no question of principle is involved on the facts of this case, which in their Lordships' judgment do not take the case out of the ordinary common law rule recently discussed by this Board in *Bengal Nagpur Railway Co.* v. *Ruttanji Ramjii*. Their Lordships will not repeat what was there said. In the present case no custom or contract to pay interest was proved, and further no reason has been shown for treating the debt as a debt in equity to which equitable rules as to recovery of interest can apply. In any case this question is not such as on the facts of the case to be a proper subject for invoking the appellate jurisdiction of this Board.

A further point was raised by the appellants. They urged that the judgment of the High Court appealed from was not a valid judgment because it failed to comply with O. 41, r. 31, of the Code of Civil Procedure. The relevant facts on this issue are that the hearing in the High Court was before two Judges, Harrison and Agha Haider, JJ., and was actually delivered by the former Judge, the latter agreeing. The judgment was delivered on the 22nd February, 1933, but Harrison, J., went on leave before signing the judgment, which was signed by Agha Haider, J., the Deputy Registrar appending a note that Harrison, J., had gone on leave before signing the judgment he delivered.

1. (1938) 1 M.L.J. 640: L.R. 65: I.A. 66: I.L.R. (1938) 2 Cal. 72 (P.C.).

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O. 41, r. 31 requires that the judgment of the Appellate Court shall be in writing and shall state various matters, and "shall at the time that it is pronounced be signed and dated by the Judge or by the Judges concurring therein".

The rule does not say that if its requirements are not complied with the judgment shall be a nullity. So startling a result would need clear and precise words. Indeed the rule does not even state any definite time in which it is to be fulfilled. The time is left to be defined by what is reasonable. The rule from its very nature is not intended to affect the rights of parties to a judgment. It is intended to secure certainty in the ascertainment of what the judgment was. It is a rule which Judges are required to comply with for that object. No doubt in practice Judges do so comply, as it is their duty to do. But accidents may happen. A Judge may die after giving judgment but before he has had a reasonable opportunity to sign it. The Court must have inherent jurisdiction to supply such a defect. The case of a Judge who has gone on leave before signing the judgment may call for more comment, but even so the convenience of the Court and the interest of litigants must prevail. The defect is merely an irregularity. But in truth the difficulty is disposed of by Ss. 99 and 108 of the Civil Procedure Code. S. 99 provides that no decree shall be reversed or substantially varied nor shall any case be remanded in appeal on account of . . . any error, defect or irregularity in any proceedings in the suit not affecting the merits of the case or the jurisdiction of the Court. That section comes in the part dealing with appeals from original decrees. But S. 108 applies the same provision to appeals from appellate decrees, and it is always in the discretion of the Board to apply the principle on appeal to His Majesty in Council. In their Lordships' judgment, the defect here was an irregularity not affecting the merits of the case or the jurisdiction of the Court, and is no ground for setting aside the decree.

Various cases on similar irregularities which have come before the Courts in India have been cited. Their Lordships do not find anything in these authorities to affect their decision here.

Their Lordships are of opinion that the appeal fails and should be dismissed with costs.

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They will humbly so advise His Majesty.

Solicitors for Appellants: *Mehra & Co.*

Solicitors for Respondents: *T. L. Wilson & Co.*

R.C.C. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VARADACHARIAR.

Perumal Naicken .. *Petitioner* in both (Petitioner—1st Defendant)*

v.

Kondama Naicken and another .. *Respondents in both (Respondents—Plaintiffs).*

Perumal Naicken v. Kondama Naicken.

Civil Procedure Code (V of 1908), O 9, rr. 6 and 7—Defendant declared ex parte—*Appearing before Court before trial began—If can file written statement and lead evidence also on his own behalf.*

Where a defendant in a mofussil suit failed to appear on the first hearing date and was set *ex parte*, and a later petition by the said defendant to have the *ex parte* order set aside was dismissed, and nothing further had happened in the suit beyond the other defendants filing written statements and framing of issues thereon, the defendant was entitled to file a written statement and proceed with the trial by cross-examining the plaintiff's witnesses and also by leading evidence on his own behalf. In the absence of a statutory restriction corresponding to O. 6, r. 2 of the Original Side Rules of the High Court, the mofussil Courts cannot impose any restriction on a defendant set *ex parte* continuing the suit at the stage at which it stands when he appears, so long as he does not thereby re-open anything that has been done already The filing of a written statement before the trial has commenced does not amount to re-opening anything that has happened already, notwithstanding the fact that it may involve framing of additional issues.

Venkatasubbiah v. *Lakshminarasimham*, (1925) 49 M L J. 273, followed and applied.

Petitions under S. 115 of Act V of 1908 and S. 107 of the Government of India Act, praying the High Court to revise the orders of the Court of the District Munsif of Karur dated 15th August, 1936 and 10th September, 1936 and made in I.A. Nos. 747 and 866 of 1936 respectively in O. S. No. 512 of 1935.

L. V. Krishnaswami Aiyar for Petitioner.

P. J. Kuppanna Rao for Respondents.

The Court delivered the following

JUDGMENT.—These petitions have been filed by the first defendant in the Lower Court, asking this Court to revise two

* C. R. Ps Nos. 1317 and 1561 of 1936. 21st October, 1938.

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orders passed by the lower Court in the following circumstances.

The first defendant did not appear on the first hearing date and he was declared *ex parte* on 10th January, 1936. On 30th July, 1936, he applied to have that order set aside alleging that summons had not been served on him. The lower Court was of opinion that this allegation was not true and accordingly dismissed that petition on 15th August, 1936. C.R.P. No. 1317 has been filed against this order.

On 18th August, 1936, the first defendant applied for permission to file a written statement and to take further part in the conduct of the case. The District Munsif was of opinion that in view of his former order dismissing his application to set aside the order declaring him *ex parte* all that the first defendant could be permitted to do was to cross-examine the witnesses on the other side without letting in any evidence on his side. He was also of opinion that the first defendant was not entitled to file a written statement at that stage. With these observations, he dismissed the petition of the 18th August, 1936 and it is against this dismissal that C.R.P. No. 1561 of 1936 has been filed.

So far as C.R.P. No. 1317 is concerned, I do not feel justified in interfering with the order of the lower Court. The finding that the first defendant had been duly served is a finding of fact which I see no reason to set aside on any grounds open in revision. I may however add that though it is the practice in the mofussil to pass an order declaring a defendant *ex parte*, the Code does not in terms provide for an application to set aside that order. All that r. 7 of O. 9 provides is that where the *ex parte* hearing of a suit has been adjourned the defendant may at any time before the disposal of the suit appear and if he assigns good cause for his previous non-appearance, he may be heard in answer to the suit as if he had appeared on the day fixed for his appearance. It is only when a decree has been passed that an application in terms to set aside that decree is contemplated in r. 13. With this observation, I dismiss C.R.P. No. 1317 with costs.

In C.R.P. No. 1561, however, I am unable to approve of the order passed by the lower Court. I am not able to gather the exact ground on which the District Munsif thought

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that the first defendant can only cross-examine witnesses on the other side but not lead any evidence on his side. There is no doubt a specific provision of this kind in the Original Side Rules—*see* O. 6, r. 2 of the Original Side Rules—but in the absence of any express statutory provision of this kind, courts in the mofussil seem to me to have no warrant to impose such a restriction. Among the authorities referred to by the District Munsif, it is sufficient to refer to the judgment of Wallace, J., in *Venkatasubbiah* v. *Lakshminarasimham*[1]. The principle enunciated by the learned Judge is that even a defendant who fails to show good cause for his previous non-appearance is not debarred from participating in the further conduct of the case and that the Original Order only covers the period during which the party was originally absent. He proceeds to point out that where good cause for non-appearance is shown, the party would be relegated back to the position which he would have been put in if he had appeared at the previous hearing, that is, that proceedings which have taken place in his absence could be re-opened so as even to give him the opportunity of cross-examining witnesses that had been examined in his absence. This principle has generally been adopted in most of the reported cases—vide *Pattabirama Aiyangar* v. *Neli Chetti*[2], *Arumugam Pillai* v. *Kandasami Pillai*[3] and *Harba* v. *Mt. Chandrabhaga*[4]. The extreme view taken in Oudh is opposed to the preponderance of authority. On the above principle, I do not see any justification for drawing a distinction between the liberty to cross-examine the plaintiff's witnesses and the liberty to adduce evidence on his own side so far as future proceedings are concerned.

I have however felt some hesitation as to whether or not the first defendant should be permitted to file a written statement. But I have come to the conclusion that there is no reason to deny him this opportunity. According to the test suggested by Wallace, J., it will not, in any sense, be *re-opening* what has happened in the past, if the first defendant should be permitted to file a written statement. I am informed that other defendants have filed written statements and certain issues have been framed thereon. No evidence has yet been recorded. I also gather that the first defendant is not content with the issues

1. (1925) 49 M.L.J. 273.
2. (1927) I.L.R. 51 Mad. 597.
3. A.I.R. 1928 Mad. 211 (2).
4. A.I.R. 1931 Nag. 122.

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raised already and that his proposed written statement might raise other issues. Assuming these facts to be true it appears to me that what the first defendant asks for is nothing in contravention of what the authorities recognise him to be entitled to. The mere fact that on the new statement, additional issues may have to be framed does not amount to re-opening anything that has happened already. It has been stated that even while asking for permission to file the additional written statement, the petitioner stated that he had his witnesses ready and that he did not require any adjournment on the ground of having to summon any witness. It may be that on the filing of the petitioner's written statement, the plaintiff might require time to get ready to meet the plea there raised; but that is an indulgence required by the plaintiff and not an indulgence required by the petitioner. I quite realise that the object of rr. 6 and 7 of O. 9 will be frustrated if defendants could be allowed to absent themselves with impunity at the earlier stages of a litigation. But where by reason of causes for which none of the parties is responsible, the case has not made much progress, there is no reason why these rules should be applied as penal provisions depriving parties of the opportunity of putting forward their defence. The rule laid down in *Venkatasubbiah* v. *Lakshminarasimham*[1] seems to me, if I may say so, to adopt the golden mean and according to the test there laid down, I think this petition ought to be allowed.

The lower Court is directed to receive the written statement proposed to be filed by the first defendant and frame the necessary issues after giving sufficient opportunity to the other parties to file any additional pleadings that they may consider necessary in view of the first defendant's written statement. In the circumstances there will be no order as to costs in C.R.P. No. 1561.

S.V.V. *Petition allowed.*

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1. (1925) 49 M.L.J. 273.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN AND MR. JUSTICE LAKSHMANA RAO.

Somasundara Edangapurandar *alias* Somasundara Eratha Bakish Packiri Sahib and others .. *Appellants** (*Defendants*)

v.

K. P. Narasimhachariar .. *Respondent* (*Plaintiff*).

Somasundara Edangapurandar v. Narasimhachariar.

Limitation Act (IX of 1908), S. 20—Promissory note executed by Hindu father—Doctrine of pious obligation—Death of father—Son subsequently becoming convert to Islam—Acknowledgment of liability by such person—Effect—Saving of limitation.

The suit promissory note was executed by the father of defendants 1 to 3 in 1918 and it was kept alive by him until he endorsed on it a payment made on 6th August, 1921. Subsequently the father died leaving his three sons and thereafter on 5th August, 1924, the second defendant paid a certain sum towards the debt and endorsed the payment. It appeared that six months before that, that is on the 6th February, 1924, the second defendant was converted to Islam.

Held, that as at the time of the death of their father the sons were liable to pay the debt the payment on 5th August, 1924, was made by a person who was liable to pay the debt and that under S. 20 of the Limitation Act a fresh period of limitation began from that date.

Pangudaya Pillai v. *Uthandiya Pillai*, (1938) 2 M.L.J. 33, considered.

Held, further, that the conversion of the second defendant to Islam could not operate to rid him of his liability for the debt due under the promissory note.

Appeal against the decree of the Court of the Subordinate Judge of Kumbakonam in A. S. No. 122 of 1931—A.S. No. 256 of 1931, District Court of Tanjore West at Tanjore preferred against the decree of the Court of the District Munsiff of Kumbakonam in O. S. No. 225 of 1930.

K. V. Ramachandra Aiyar and *S. Thyagaraja Aiyar* for Appellants.

R. Ramamurthi and *N. Rajagopalan* for Respondent.

The judgment of the Court was delivered by

Burn, J.

Burn, J.—We are of opinion that this appeal must fail. The promissory note was executed by the father of defendants 1 to 3 in 1918 and it was kept alive by him until he endorsed on it on the 6th of August of 1921 the payment of Rs. 82. That would keep the note alive until the 5th August, 1924. In the meantime the father, Ramaswami, died leaving the three defen-

* S. A. No. 1064 of 1933. 27th July, 1938.

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Burn, J.

dants, his sons, surviving him. On the 5th of August, 1924, the second defendant paid Rs. 25 towards the debt and endorsed the payment. Six months before that, on the 6th of February, the second defendant was converted to Islam. Now it is clear that at the time of Ramaswami's death his sons were liable to pay the amount of this promissory note. The payment on the 5th of August, 1924, was made therefore by a person who was liable to pay the debt and under S. 20 of the Limitation Act a fresh period of limitation began from that date. On the 4th of August, 1927, second and third defendants paid Rs. 10 towards the debt and endorsed that payment. Therefore if the payment of 5th August, 1924, kept it alive until 4th August, 1927, the note was still alive on the 4th of August, 1930, when the suit was filed. We agree with the learned District Munsiff and the learned Subordinate Judge in holding that the conversion of the second defendant to Islam in February, 1924, cannot operate to rid him of his liability for the debt due under the promissory note. We have been referred to the case of *Pangudaya Pillai* v. *Uthandiya Pillai*[1]. But we find we cannot derive any help from that case. That was a case in which the promissory note was executed by the eldest of the three brothers and it was held that after partition the endorsement of payment by the eldest brother would not bind the younger brothers. It is clear that the principle of pious obligation cannot enter into a case like that. In this case we are in agreement with the learned Subordinate Judge and the learned District Munsiff. In paragraph 11 of his judgment, the learned Subordinate Judge observes:

"Under S. 20, if the person making a payment is one liable to pay the debt, the payment would keep alive the debt even as against other persons, provided those other persons are liable whether or not the former was joint with the latter or possessed a representative character at the time of payment. Here in the present case, Ramaswami, the maker of the note, was only liable to pay the debt, and his liability continued till his death even after his conversion. On the theory of pious obligation, the sons also became liable as soon as the note was executed, and each one of them is a person liable to pay the debt within the meaning of S 20. Further on the death of Ramaswami, each one of his sons as his heir or representative became liable to pay the debt to the extent of his interest in his (Ramaswami's) separate properties."

1. (1938) 2 M.L.J. 33.

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This we think is a correct statement of the law. It follows that this appeal must be dismissed with costs.

We have been asked to say that this decision will not prejudice any application which the defendants may be advised to make under S. 19 of the Madras Act IV of 1938.

B.V.V. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Kamadana Seshayya Rao and others .. *Appellants** (*Defendants*)

v.

Kotamarthi Arundhatamma .. *Respondent* (*Plaintiff*).

Seshayya Rao v. Arundhatamma.

Madras Estates Land Act (I of 1908), Ss. 26 (3), 77 and 199—Dispute about rate of rent—Fixation by a compromise approved by Court—Effect—Successor of landholder—Right to question rate fixed by compromise—Payment by ryot at enhanced rate—Ryot if bound by.

There was a dispute as to the rate of rent and in a suit by the landholder's predecessor against the ryot's predecessor a compromise was entered into which definitely purported to fix the rate of rent for future and it did not purport to fix it as a favourable rent or a reduction of rent but as the proper rent. The Court approved of the compromise. Subsequently by oversight the ryot went on paying at a rate higher than what was fixed by the compromise and executed muchilikas which recognized the enhanced rate. The landholder claimed rent at the higher rate.

Held, that the rate fixed by the Court was a lawful rate and that S. 26 (3) has no application to the rates of rent fixed in a compromise decree approved under S. 199 by the Court Subsequent payments at an enhanced rate and subsequent muchilikas embodying the enhanced rate will not bind the ryot.

Narayana Patrudu v. *The Manager of Peda Marangi Estate*, (1927) 54 M. L.J. 564: I.L.R. 51 Mad. 228, relied on.

Appeal against the decree of the District Court of Kistna at Masulipatam in A. S. No. 140 of 1933, presented against the decree of the Court of the Sub-Collector of Bezwada in S. S. No. 134 of 1933.

P. Satyanarayana for Appellants.

V. Govindarajachariar for Respondent.

The Court delivered the following

JUDGMENT.—This appeal raises a question, on which so far as I am aware there is no precise authority, with reference to S. 26, sub-S. (3) of the Madras Estates Land Act. The appellants were defendants in a suit brought by the plaintiff, a

* S. A. No. 741 of 1934. 30th September, 1938.

ryot, to raise a distraint under S. 112 of the Act. The basis of the plaintiff's case was that the rent at the rate of Rs. 10 claimed by the landholder in the attachment notices was not the lawful rate and that the lawful rate was Rs. 6-12-0 on the basis of a compromise decree, Ex. A dated 7th January, 1922, in a suit for rent brought by the predecessor of the defendants against the predecessors of the plaintiff. The appellants' contention is that the rate fixed in the decree is not a lawful rate but a favourable rate granted by their deceased predecessor and that by virtue of S. 26 (3) they are entitled to revert to the lawful rate of the land after the death of the person who agreed to the favourable rate.

The facts are not in dispute. The compromise decree, Ex. A, resulted from a suit of 1921 brought by the landholder for rent and the terms on which the suit was decreed were that the defendant should pay certain specified sums for the suit faslis and should thereafter pay at the rate of Rs. 6-12-0 per acre with a concession rate of Rs. 2-8-0 per acre in years when the crops did not yield. The pleadings in that suit have not been exhibited, but I am of opinion that from the terms of the compromise decree, it can be inferred that there was a dispute as to the rate of rent due on the land. The present defendants purchased the estate in 1924. The plaintiff purchased the holding in 1925. By a curious oversight it appears not to have been noticed by the plaintiff or by her predecessor that the present suit lands were included in the lands covered by the compromise decree and both the plaintiffs' predecessor and the plaintiff herself went on paying at the rate which prevailed previous to this compromise, which was Rs. 10 per acre, the rate now claimed by the appellants. Not only did they pay this rate but they executed muchilikas in which this rate was recognised as the rate on which the land was held. Recently the plaintiff discovered that her land was covered by the compromise decree and when the land was attached for rent claiming at the ten rupee rate, she filed the present suit alleging that the proper rate for the land was Rs. 6-12-0.

Now I may observe that, in my opinion, S. 26 (3) of the Act is not confined in its operation to original grants of land and that it does apply to a grant at a reduced rent of land already in the enjoyment of a ryot. But so far as I know, it has never been decided whether S. 26 (3) does or does not

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apply to a favourable rate of rent granted by the previous landholder and embodied in a decree of Court in a suit under S. 77. This is a question which has to be decided with reference to the provisions of the Act and without the help of authorities. I may however refer to the ruling in *Narayana Patrudu* v. *The Manager of Peda Marangi Estate*[1] as authority for the position, about which there can be no doubt, that when there is a dispute regarding the rate of rent that dispute can be the subject of adjudication by the Court in a suit brought under S. 77 merely for recovery of rent. This has a bearing in view of the provisions of S. 199 which deals with compromises under the Act. S. 199 provides that the Court may pass a decree in terms of any lawful agreement or compromise so far as it relates to the suit and that any decree passed in accordance with such lawful agreement, compromise or satisfaction shall be final so far as it relates to so much of the subject-matter of the suit as is dealt with by such agreement, compromise or satisfaction. Now it is argued for the appellants that this compromise related not only to the rent for the faslis then demanded but also to future rents and that to the extent to which it provides for future rents it goes beyond the subject-matter of the suit. It is also contended that, in view of the provisions of S. 26 and the finding of the Courts below that at the time of the compromise the lawful rent was Rs. 10 per acre, the compromise goes beyond the powers of the then landholder if it is taken to be a fixation of rent at a favourable rate in perpetuity. The argument is that the landholder cannot by contract bind his successors by a favourable rate granted to a ryot. It is argued that there is no particular sanctity attached to a contract embodied in a decree of Court which goes beyond the subject-matter of the suit, and that even if it be held in accordance with the provisions of S. 199 that the contract embodied in a compromise approved by Court will bind the succeeding landholders, this can only be in so far as it related to the subject-matter of the suit and the subject-matter of the suit must be taken to be the rent payable in the light of the limitation on one landholder's powers of fixing the rent in the future. This argument is ingenious but I am of opinion that it is fallacious. S. 26, sub-S. (3) is intended to deal with cases of voluntary remissions given by a landholder so as to reduce

1. (1927) 54 M.L.J. 564: I.L.R. 51 Mad. 228.

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the value of the estate which is to be taken by his successor and it is in accordance with the policy of the Act to hold that such a voluntary remission given by a mere contract would have no greater sanctity than one which is given as an act of grace. But the Act provides for the settlement of disputes regarding the rate of rent by means of compromises subject to the approval of the Court. I think it must be assumed that the Court would not approve of a compromise which would be prejudicial to the rights of future Zamindars. Moreover the effect of a compromise of a dispute regarding the rate of rent must be taken to my mind to settle not only what is the rate of rent payable during the lifetime of the present Zamindar but what is the lawful rate of rent payable on the land, unless the compromise does not purport to provide for future rates. The compromise Ex. A definitely purports to fix the rate of rent for the future and it does not purport to fix it as a favourable rent or a reduction of rent but as the proper rent. I think it follows that the Court having as provided by S. 199 approved of this compromise, the rate of rent for the future embodied in that compromise was also approved by the Court. This fixation of rent is therefore not the voluntary act of the then landholder, but it becomes the act of the Court. It seems to me to be illogical to treat a fixation of rent approved by the Court as the irresponsible act of a deceased predecessor. In that view I hold that S. 26, sub-S. (3) has no application to rates of rent fixed in a compromise decree approved by the Court. It follows that Ex. A specifies that is the lawful rate of rent for the suit land and it is undeniable that subsequent payments at an enhanced rate and subsequent muchilikas embodying the enhanced rate would not bind the ryot. His rent can only be raised by the procedure laid down in the Act.

The appeal is therefore dismissed with costs.

Leave to appeal granted.

K.C. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO.

Perumal Mooppan and another .. *Appellants** (*Defendants*)

v.

Subramania Mudaliar .. *Respondent* (*Plaintiff*).

Perumal Mooppan *v.* Subramania Mudaliar.

Transfer of Property Act (IV of 1882), S. 41—Conditions requisite for operation of—Mere entry in Survey Register of a name not sufficient to prove ostensible ownership in a person.

In a suit for redemption and possession of the suit property by the plaintiff on payment of an othi amount due in favour of first defendant's father, and second defendant who was an othidar from first defendant claimed to be the *bona fide* transferee from first defendant for value without knowledge of the ownership of plaintiff, an entry in Survey Register happened to be in the first defendant's name and therefore it was contended that S. 41 of the Transfer of Property Act operated against the plaintiff,

Held, that for the operation of that section it must be shown that the first defendant was the ostensible owner with the consent, express or implied, of the person interested in the property. The mere fact that an entry was made in the Survey Register cannot be relied on as such consent.

Appeal against the decree of the Court of the Subordinate Judge of Sivaganga in A. S. No. 26 of 1933 preferred against the decree of the Court of the District Munsiff of Manamadura in O. S. No. 514 of 1930.

Facts:—Suit for redemption and possession of suit property on payment of othi amount due on an oral othi executed by plaintiff's vendor in favour of first defendant's father. The second defendant was an othidar from the first defendant.

The first defendant denied the othi, disputed the identity of the land, also claimed that the plaintiff's suit was barred because the suit land was entered in the survey record as belonging to the defendant and that entry had not been set aside.

The second defendant claimed to be a *bona fide* transferee for value and was led to believe by the entry in the Survey Register of the land in the name of the first defendant that he was the owner and that S. 41 of the Transfer of Property Act operated against the plaintiff.

V. Ramaswami Aiyar for Appellants.

P. N. Appuswami Aiyar for Respondent.

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* S.A. No. 865 of 1934. 13th October, 1938.

Perumal Mooppan v. Subramania Mudaliar.

The Court delivered the following

JUDGMENT.—The only point urged by Mr. V. Ramaswami Aiyar is that his clients should have been given relief under S. 41 of the Transfer of Property Act by non-suiting the plaintiff. I do not think this contention is tenable. Under S. 41 it must be shown that the first defendant was the ostensible owner with the consent express or implied of the person interested in the property. There is no evidence of tacit consent. The mere fact that an entry was made in the Survey Register cannot be relied on as such consent. I therefore dismiss the second appeal with costs.

Leave to appeal refused.

K.C. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VARADACHARIAR AND MR. JUSTICE ABDUR RAHMAN.

Kasturi Narasaraju .. *Appellant** (*Plaintiff*)

v.

Kasturi Satyavatamma and others .. *Respondents* (*Defendants*).

Narasaraju v. Satyavatamma.

Hindu Law—Will—Construction—Authority to wife to adopt a boy if a male child be born but it does not survive—If implies a general power to adopt—Birth of a daughter—If wife entitled to adopt.

A testator's will provided in cl. (3) that if his wife then pregnant gave birth not to a male child but to a female child, the child is to be married with a particular Katnam, etc., and cl. (8) provided that "if male child be born and it does not survive my wife, she is to adopt a boy of her choice or a boy among my agnates, till the adoption abides". The wife gave birth to a daughter and not a son.

Held, the testator cannot be said not to have been alive to the contingency of a daughter being born, because cl. (7) has provided for it and has not given his wife a power of adoption in that contingency. It is only the contingency of a male child being born that is provided for. The will does not confer a general power of adoption on the widow based on an anxiety of the testator that he should in any event be represented by a son.

Raja Venkata Narasimha Appa Row v. *Raja Parthasarathi Appa Row*, (1913) 26 M.L.J. 411: L.R. 41 I.A. 51: I.L.R. 37 Mad. 199 (P.C.) and *Bhagwat Koer* v. *Dhanukdhari Prasad Singh*, (1919) 37 M.L.J. 513: L.R. 46 I.A. 259: I.L.R. 47 Cal. 466 (P.C.), followed.

Appeal against the decree of the Court of the Subordinate Judge of Amalapuram in O.S. No. 42 of 1933.

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*Appeal No. 126 of 1937. 20th October, 1938.

Narasaraju v. Satyavatamma.

P. Satyanarayana Rao for Appellant.

G. Lakshmanna, G. Chandrasekara Sastri and *V. Parthasarathy* for Respondents.

The judgment of the Court was delivered by

Varadachariar, J.

Varadachariar, J.—This is a litigation arising out of disputes between an adopted son and the adoptive mother. The first defendant is the widow of one Raghupathi who died in March, 1925, leaving a will (Ex. A) dated 25th February, 1925. The first defendant adopted the plaintiff, who was her younger brother, on 1st May, 1930, and, at that time, the parties entered into an ante-adoption agreement. For reasons which it is unnecessary to detail, the parties fell out and the plaintiff filed the suit out of which this appeal arises for a declaration that the ante-adoption agreement was not binding upon him and sought consequential reliefs following from that declaration. The first defendant replied by impeaching the validity of the plaintiff's adoption. She contended that the adoption made by her was not authorised by the will, Ex. A, and that it was therefore invalid. Various other questions were raised by the issues framed in the case; the question of the construction of the authority and the consequent validity of the plaintiff's adoption was raised by the first issue. The lower Court dealt with the first issue as a preliminary issue; and construing the will as not giving the widow an authority to adopt in the events that have happened, it held the plaintiff's adoption to be invalid and accordingly dismissed the suit. Hence this appeal.

The only point for decision in the appeal is as to the true construction of the clause in the will (cl. 8) giving the widow power to adopt. We may however refer to one grievance mentioned before us by the learned Counsel for the appellant in respect of the procedure adopted in the lower Court. It was brought to our notice that in the issues as originally framed, there was an issue relating to estoppel, namely, issue No. 2. "Whether the defendants are not estopped from disputing the validity of the adoption", but this was dropped when the issues were recast by the learned Judge, on 14th November, 1936, with the result it was said that the plaintiff had been prejudiced by no evidence having been taken on this question of estoppel. We do not see any basis for any grievance on this

score nor is there much force in it. Neither in the grounds of appeal originally filed nor in the additional ground subsequently filed do we find any objection raised to the course adopted by the lower Court in this respect. We may also point out that the issue of estoppel should not have been raised on the pleadings at all, as observed by the learned Subordinate Judge. The deed of adoption specifically states that the adoption was made in pursuance of the authority conferred by the husband's will and paragraph 6 of the plaint also stated that the adoption took place in pursuance of the authority contained in the will. If the will does not authorise the adoption, it seems to us there is an end of the matter. There is no suggestion anywhere of any representation of oral authority by the widow and there is accordingly no basis for the plea of estoppel. We do not therefore see any reason to allow any objection under this head to be raised at the hearing of the appeal.

Proceeding now to the construction of the will, we are of opinion that the construction placed by the lower Court on cl. (8) of the will is correct. To understand the scheme of the will, it is necessary to remember that the testator had a daughter two or three years old, alive at the date of the will. His wife was then pregnant and he provided in the will for the contingency of her giving birth either to a male child or to a female child. In cl. (6), he provided that if she gave birth to a male child, she should manage the property till that child attained majority and then hand it over to him. In cl. (7) he provided that if the wife gave birth to a female child she was to be married in the same manner as was provided for the existing daughter in a previous clause. Then comes cl. (8) which runs as follows:—

"If a male child be born but it does not survive my wife Satyavati, she is to adopt a boy of her choice or a boy among my agnates, till the adoption abides. The said adoptee is to take my estate in full ownership; and during his minority my wife shall be in possession of the estate."

It turned out that the wife gave birth to a daughter and it unfortunately happened that the pre-existing daughter as well as this daughter died shortly afterwards. It need hardly be stated that these events which happened subsequent to the death of the testator cannot affect the construction of the will.

Mr. Satyanarayana Rao, the learned Counsel for the appellant, has asked us to construe the will as conferring a general power of adoption on the widow based on an anxiety

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Varadachariar, J.

of the testator that he should in any event be represented by a son, whether *Aurasa* or adopted. We do not think that the language of the will can be so interpreted. We are not, by any means, satisfied that the testator desired that in all possible events, he should be represented by a son. But even if we can impute any such intention to the testator, we have still got to see whether that intention is expressed or can be clearly implied in the clause of the will. In cl. (7), he distinctly contemplated the contingency of the birth of a daughter to his wife. But he does not follow up that contingency by providing for an adoption by his widow in that case. It is only a specific contingency that is provided for in cl. (8) which confers the power of adoption, namely, the contingency of the child to be born being a male and its pre-deceasing the widow. Cases like *Suryanarayana* v. *Venkataramana*[1] and *Dharam Kunwar* v. *Balwant Singh*[2] relied on by the learned Counsel for the appellant are of no help to him, because they dealt with a general power of adoption and only held that such a general power should not be unduly restricted nor treated as exhausted by a single adoption. In *Surendra Nandan* v. *Sailaja Kant Das Mahapatra*[3] and *Rattan Lal* v. *Baij Nath*[4], the Court had only to consider how far a general power was restricted by reference in the will to other considerations. The present case has, in our opinion, to be determined with reference to the principles laid down by their Lordships of the Judicial Committee in *Raja Venkata Narasimha Appa Row* v. *Raja Parthasarathi Appa Row*[5] and *Bhagwat Koer* v. *Dhanukdhari Prasad Singh*[6]. In the latter case, cl. (4) of the will then in question (set out on p. 478) began with the words, "If by the will of Providence, no male or female child be born to me" and in that contingency the testator conferred a power to adopt on his widow. It actually happened that after his death, a female child was born to one of his widows. Dealing with the validity of an adoption made by a widow in those events their Lordships observed (on p. 479) that whatever might be the strength of the presumption in favour of a Hindu's

1. (1906) 16 M.L.J. 276: L. R. 33 I.A. 145: I.L.R. 29 Mad. 382 (P.C.).
2. (1912) 23 M.L.J. 200: L.R. 39 I.A. 142: I.L.R. 34 All. 398 (P.C.).
3. (1891) I.L.R. 18 Cal. 385.
4. A.I.R. 1937 P.C. 292.
5. (1913) 26 M.L.J. 411: L.R. 41 I.A. 51: I.L.R. 37 Mad. 199 (P.C.).
6. (1919) 37 M.L.J. 513: L.R. 46 I.A. 259: I.L.R. 47 Cal. 466 (P.C.).

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desire to be represented by an adopted son and though "the Courts would not be astute to defeat an adoption not clearly in excess of the power" it was not for the Court unduly to strain the words of the will or to make a will for the testator; and their Lordships added that the opening words of cl. (4) must be held to govern the other clauses and it was impossible without going outside the terms of the will to hold that in the events that had happened, the power took effect. We are unable to see how the present case differs in principle from the case in *Bhagwat Koer* v. *Dhanukdhari Prasad Singh*[1]. Cl. (8) of Ex. A begins with the words "if a male child be born" and it is only that contingency that is provided for. It is not possible to say that the testator was not alive to the contingency of a daughter being born because cl. (7) has provided for it, and it is obvious that he has not chosen to give his wife a power of adoption in that contingency. If we are to hold that even in that contingency the widow must have been intended to be authorised to adopt, the Court would clearly be providing for a contingency which the testator left unprovided for. This is what their Lordships held to be beyond the power of the Court, in *Raja Venkata Narasimha Appa Row* v. *Raja Parthasarathi Appa Row*[2]. A case which seems to be practically on all fours with the present is referred to by Sir D. F. Mulla as reported in Coryton 1, 42.—*See* Illustration (*a*) on page 520 of the eighth edition, of his book on Hindu Law. But as that report is not available to us here, we do not propose to base our decision on the authority of that case. But for the reasons stated above, we have come to the same conclusion.

We may add that the above construction does not, in our opinion, lead to any unnatural results nor is it inconsistent with the presumed intention of a Hindu testator. It must be remembered that at the time of his death, the testator had a daughter alive. Even if another daughter should be born, these daughters would in the ordinary course inherit the estate for their lives and after them any son or sons born to them or either of them would succeed. We do not think that it is the general sentiment of any Hindu testator that his daughter's

1. (1919) 37 M.L.J. 513: L.R. 46 I.A. 259: I.L.R. 47 Cal. 466 (P.C.).
2. (1913) 26 M.L.J. 411: L.R. 41 I.A. 51: I.L.R. 37 Mad. 199 at 225 (P.C.).

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Varadachariar, J.

son should be superseded by an adopted son. The testator in the present case might well have thought that it was unnecessary to provide a power of adoption in the event of a daughter being born because he might have been content to leave the estate to devolve on the daughters and the daughters' sons. On the other hand, his making provision for the contingency of a male child being born and pre-deceasing the widow is quite intelligible. As explained by the learned Subordinate Judge the moment, a male child was born after the testator's death, he would become the stock of descent and under the law as it stood at the time, the daughters and their children would have been excluded by the *gnati* reversioners. It was therefore natural that he should have provided for that contingency by directing his wife to make an adoption so that the property might remain in his own family.

We accordingly hold that the lower Court has come to a right conclusion. The appeal fails and is dismissed with costs of the first respondent.

S.V.V. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN AND MR. JUSTICE STODART.

S. P. Perumal Chettiar .. *Appellant** (*Respondent*)

v.

M. K. Kondal Chetty and another .. *Respondents* (*Petitioners*).

Perumal Chettiar v. Kondal Chetty.

Madras City Tenants' Protection Act (III of 1922) and Civil Procedure Code (V of 1908), S. 105—Order under S. 7 of the Madras City Tenants' Protection Act—Appeal against—Maintainability of.

The order passed by a City Civil Court Judge under S. 7 of the City Tenants' Protection Act fixing a reasonable rent is not appealable.

Appeal against the order of the Court of the City Civil Judge, Madras, dated the 12th day of March, 1937 and made in O. P. No. 115 of 1936.

N. S. Rangaswami Aiyangar for Appellant.

A. Narasimhachariar for Respondents.

The judgment of the Court was delivered by

Burn, J.

Burn, J.—The appellant is the owner of 1/34, Selva Vinayakar Koil Street, Old Washermanpet, Madras. This

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* A. A. O. No. 27 of 1938. 3rd November, 1938.

Perumal Chettiar v. Kondal Chetty. Burn, J.

house is the superstructure upon a site belonging to the respondents, and the appellant pays ground rent to the respondents. The respondents applied by a petition under S. 7 of the Madras City Tenants Protection Act (Madras Act III of 1922) to the City Civil Court to fix a reasonable rent for the occupation of the land on which the appellant's house is built. The ground rent previously paid was Rs. 7 per month. The learned Principal Judge of the City Civil Court heard the application, came to the conclusion that a reasonable rent would be Rs. 7-12-0 and fixed the rent at that figure. This is within the limit fixed by the proviso to S. 7 of the Act. The proviso is:

"That the rent previously payable for the land shall not be enhanced by more than two annas in the rupee."

The appellant has filed this appeal purporting to be under S. 15 of the City Civil Court Act read with S. 96 of the Civil Procedure Code.

Learned Counsel for the respondents has taken a preliminary objection that the order passed by the learned Principal Judge of the City Civil Court in this case is not subject to appeal. He has pointed out that S. 7 enables the Court to fix a reasonable rent "by its *order*". In the Madras City Tenants Protection Act, no appeal is given from an order passed under S. 7. On general principles, it is laid down in S. 105 of the Civil Procedure Code:

"Save as otherwise expressly provided, no appeal shall lie from any order made by a Court in the exercise of its original or appellate jurisdiction."

Learned Counsel for the appellant relies on S. 8 of the Act which runs as follows:

"An order passed by a Court under S. 6, S. 7 or S. 7-A, shall have effect as a decree in a suit and the rent so fixed shall not be revised nor shall a tenant be liable to be evicted, for a period of five years."

Appellant's learned Counsel refers to S. 96 of the Civil Procedure Code by which it is provided:

"Save where otherwise expressly provided in the body of this Code or any other law for the time being in force, an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorised to hear appeals from the decisions of such Court."

Learned Counsel says that, since the order passed in this case is to have effect as a decree in a suit, therefore it must be treated as a decree for all purposes and therefore it is appealable. We are not able to accept this contention. As already noticed, S. 7 of the Act says that the Court shall by its *order* fix

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Burn, J.

such rent as it deems reasonable. S. 8 shows that the decision of the Court is expressed in an order and the direction that this order shall have effect as a decree in a suit shows that it is not a decree. If it were a decree, the provision that it "shall have effect as a decree in suit" would be superfluous and otiose. We think the scheme of the Act is to make these orders not appealable. In the first place the Court is authorised to fix "such rent as it deems reasonable". It would obviously be very difficult for an appellate Court to deal in appeal with a matter decided under this section by a Judge. Further S. 8 gives a kind of compensation to the tenant by which the tenant is not liable to be evicted for a period of five years after the determination of the rent under S. 7. Agreeing with the learned Counsel for the respondents, we uphold the preliminary objection and find that no appeal lies. This appeal is therefore dismissed with costs.

K. C. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ABDUR RAHMAN.

Nidasanametla Venkata Seshayya .. *Appellant** (*Defendant*)

v.

The District Board, East Godavari, represented by its President .. *Respondent* (*Plaintiff*).

Venkata Seshayya v. District Board, East Godavari.

Registration Act (XVI of 1908), S. 49—Lessee agreeing to terms of lease—Subsequent execution of muchilika by him—Non-registration of the document—Suit to recover rent—Proof of the prior agreement whether necessary,

Where a lessee agreed to the terms of a contract and then executed a muchilika which embodied the terms and the contract of lease was not registered, and the lessor filed a suit to recover the rent,

Held, that the lessor was entitled to rely on the agreement which could be proved without the necessity of spelling it out of the lease itself.

Venkadari Somappa v. *The Official Receiver of Bellary*, (1938) 2 M.L.J. 362, discussed.

Appeal against the order of the Court of the Subordinate Judge of Cocanada dated 14th September, 1936, and made in A. S. No. 71 of 1936 preferred against the order of the Court of the District Munsif of Peddapuram dated 29th February, 1936 and made in O.S. No. 179 of 1935.

P. Somasundaram for Appellant.

T. Satyanarayana for Respondent.

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* A.A.O. No. 498 of 1936. 4th November, 1938.

Venkata Seshayya v. District Board, East Godavari.

The Court delivered the following

JUDGMENT.—A suit for specific performance was filed on behalf of the District Board, East Godavari, against one N. Venkataseshayya in the following circumstances: The plaintiff (District Board) advertised in the Godavari District Gazette that a lease for cultivation of certain lands would be put to auction. It was to be for five years. The terms on which the lease was to be granted were notified in the Gazette. The auction was held on the 30th May, 1930, and the defendant being the higher bidder, the Board agreed to grant the lease to him. In pursuance of the contract, a muchilika was executed by the defendant and presented to the District Board. It was not registered. The defendant failed to make payment of the rent and on a suit having been filed for its recovery on behalf of the Board, an objection was taken that the lease was inadmissible in evidence for want of registration and could not be relied upon by the Board. The Board then filed the present suit which was dismissed by the District Munsif on the preliminary ground that a suit for specific performance was not maintainable. This view did not find favour with the learned Subordinate Judge of Cocanada and he set aside the District Munsif's finding and remanded the case to him for decision on the merits. Aggrieved by this order the defendant has filed an appeal to this Court.

The only question which calls for decision in this case is whether the suit for specific performance is competent. It has been argued on behalf of the appellant that the amendments of the Transfer of Property Act, the Specific Relief Act and the Registration Act in 1929 would not help the Board and the suit for specific performance was rightly dismissed by the trial Court. It was contended that the right conferred by S. 53-A of the Transfer of Property Act was only available to the defendant to protect his possession and could not be availed of by the plaintiff in this case. Similarly it was urged that S. 27-A of the Specific Relief Act would not apply as the section refers to a contract to lease and not to a lease itself. In the same way an attempt was made to get rid of the effect of the proviso to S. 49 of the Registration Act by urging that the contract referred to in S. 49 would refer, in the circumstances of the case, only to a contract to lease and not to a lease. The learned Counsel for the respondent placed his reliance, in

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reply, on S. 117 of the Transfer of Property Act and contended that the lease being of an agricultural land the provisions of S. 107 of the Act would not be applicable to this case and the lease would be admissible in evidence even if it was not registered. This contention has however no force as the annual rent reserved under the lease was more than Rs. 50 and the provisions contained in proviso to S. 17 (1) (*d*) of the Registration Act would thus be of no avail.

As for the contentions raised on behalf of the appellant, it seems to me that a reference to S. 53-A of the Transfer of Property Act or to S. 27-A of the Specific Relief Act is not quite pertinent although S. 49-A of the Registration Act might have been amended at the same time when the other Acts were amended. The fact that all the three Acts were amended with the same object is also, in my opinion, immaterial. What has to be considered here is whether a contract to lease can be specifically enforced when the terms of the contract relating to immovable property have not only been settled between the parties but have also been embodied in a lease. The contention raised by the learned Counsel for the appellant is that the amendment to S. 49 of the Registration Act has not altered the legal situation and the lease would still be inadmissible in evidence in the suit for the specific performance of the contract. If the proposition enunciated by the learned Counsel for the appellant be correct, it appears to me that the legislature must be held to have failed to express its intention as this was exactly the mischief which the amendment was designed to remedy. It is unnecessary for me to go into the history of this legislation. Let me now examine the proviso to S. 49 of the Registration Act and see if the contention advanced on behalf of the appellant can be borne out by the language used therein. The relevant words in the proviso read as follows:—

"Provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882, to be registered, may be received as evidence of a contract in a suit for specific performance."

The learned Counsel for the appellant has urged that the words "document affecting immovable property" were meant to cover the documents containing agreements such as a contract to lease or a contract to sell and were not intended to

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cover documents which conveyed or purported to convey title to immovable properties. I do not agree with this contention. There is nothing in the language of the proviso which would justify one to place such a narrow construction. The words are unambiguous and there is no reason why full effect should not be given to them. On the other hand this interpretation would defeat the very purpose for which the amendment was effected. If the matter were *res integra*, I would have no hesitation in construing the language of the proviso in a manner which would make all the documents affecting immovable property admissible as evidence of contracts in suits for specific performance particularly when we find that documents conveying title to immovable property do not ordinarily come into existence without prior contracts. But the learned Counsel for the appellant has referred me to a recent case decided by a Division Bench of this Court and published in *Venkadari Somappa* v. *The Official Receiver of Bellary*[1], where it was held that the decisions contained in *Satyanarayana* v. *Chinna Venkatarao*[2] and *Valambal Achi* v. *Duraiswami Pillai*[3] were unaffected by the amendments made in 1929. While pronouncing their decision in *Venkadari Somappa* v. *The Official Receiver of Bellary*[1] one of the learned judges has observed:

"It is not open to me to ignore the provisions of the Registration Act and treating the instrument as a contract to transfer which it is not—compel the transferor to execute a formal transfer—which he has already done."

That is the effect of *Venkataswami* v. *Krishnayya*[4] which was recently followed and affirmed in *Satyanarayana* v. *Chinna Venkatarao*[2]. In the latter case Coutts-Trotter, C.J., said:

"I should have thought it very vicious method of construction to say that a document which purports to be one thing is to be allowed to be treated as a valid document of a different order altogether."

Mr. Somayya for the appellant contends that the new proviso to S. 49 of the Indian Registration Act has changed all that.

After quoting S. 49, the learned Judge observed:

"But that is not the same thing as saying that the unregistered instrument is itself the contract".

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1. (1938) 2 M.L.J. 362.
2. (1925) 50 M.L.J. 674: I.L.R. 49 Mad. 302.
3. A.I.R. 1928 Mad. 344.
4. (1893) 3 M.L.J. 169: I.L.R. 16 Mad. 341.

Venkata Seshayya v. District Board, East Godavari.

From what has been said by my learned brothers it would follow that the position of a person who happens to have a duly executed deed of sale or mortgage in his favour is worse than that of the person who holds merely a written contract to sell or mortgage in his possession. If this is the correct position, the latter would, but the former would not, be able to sue for specific performance of the contract and the only remedy which the person in the unfortunate position of a vendee or mortgagee or a lease-holder would have, is to apply for a compulsory registration within the few months provided by the Registration Act failing which his remedy would be barred and the conveyance useless.

With great deference to my learned brothers, I am unable to construe the words of the proviso to S. 49 in the manner suggested by them. If this were all, whatever interpretation I may be inclined to place on these words, I would be bound by the decision of the learned judges in the Division Bench case unless I decided to refer the matter to a larger Bench. It is however unnecessary for me to do so as they happened to observe at p. 366:

"In the present case it is not established that a separate agreement to mortgage was entered into prior to the execution of the mortgage-deed to prove which, the mortgage-deed might have been tendered in evidence."

In the present case, I find that the terms of the contract were advertised by the Board in the District Gazette before the auction took place and the bidder must be taken to have agreed to the terms which were advertised on behalf of the Board before he gave the bid. The agreement to lease is separate and was entered into on the date on which the auction was confirmed by the Board as a result of the bid given by the appellant. In the circumstances of this case, the agreement could be proved by the Board without the necessity of spelling it out of the lease itself. I would therefore hold that the contention raised on behalf of the appellant has no force and must be repelled. The order of the lower appellate Court is affirmed and the appeal is dismissed with costs.

Leave asked for and granted.

K.C. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN.

The Municipal Council, Tanjore by its Commissioner .. *Appellant** (*Petitioner*)

v.

Sundaresan .. *Respondent* (*4th Respondent*).

Municipal Council, Tanjore *v.* Sundaresan.

Limitation Act (IX of 1908), Art. 182 (5)—Execution petition returned for rectification not re-presented—Effect of.

It is not permissible for a decree-holder to extend the period of limitation by simply failing to re-present an execution petition returned for rectification. The proper way to deal with such a petition as that is to treat it as not having come into existence at all.

Appeal against the order of the District Court of West Tanjore at Tanjore dated the 29th day of June, 1934 and made in Appeal Suit No. 58 of 1934, preferred against the order of the Court of the District Munsiff of Tanjore dated 12th December, 1933 and made in E. P. No. 493 of 1933 in O. S. No. 581 of 1921.

K. P. Ramakrishna Aiyar for Appellant.

Respondent not represented.

The Court delivered the following

JUDGMENT.—The lower Courts are in my opinion right. It is not, in my judgment, permissible for a decree-holder to extend the period of limitation by simply failing to re-present an execution petition returned for rectification. The proper way to deal with such a petition as that is to treat it as not having come into existence at all.

In this case the Municipal Council having presented an execution petition on 15th August, 1929, which was returned for some defect, waited till 14th August, 1932 and then filed a *new* execution petition. Allegation was made that the Execution Petition of 1929 had been "lost", but there was no pretence that the Execution Petition of 1932 was a revival or continuation of it. In fact, the Execution Petition of 1932 was *not* a revival or continuation of the Execution Petition of 1929: it was a new petition altogether. Now I do not think that Municipal Councils should be encouraged to indulge in such dilatoriness and neglect as has been shown by the plaintiff

* A.A.A. O. No. 165 of 1934. 22nd August, 1938.

Municipal Council, Tanjore v. Sundaresan.

Council in this case. The decree was passed in 1922 and it ought to have been executed long ago. The first execution petition was in 1924 and there were properties brought to sale but for some reason, the sale was not held. The next petition was filed in December, 1927 and that was returned and finally dismissed as "not pressed". Then came the petition of August, 1929, and after that, full three years were allowed to pass, with nothing done. In such circumstances the learned District Munsiff would, in my opinion, have been liable to grave censure if he had used any discretion he possessed in favour of the Council.

This appeal is accordingly dismissed. There will be no costs as the respondent does not appear.

K. C. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

Gopu China Jogayya, Gopu Seshavatharam & Co. .. *Petitioner* (1st Respondent in Appeal No. 331 of 1936 on the file of the High Court)*

v.

Manepalli Bapanayya and others .. *Respondents (Appellants in do. and Nil).*

Gopu China Jogayya v. Manepalli Bapanayya.

Provincial Insolvency Act (V of 1920), Ss. 56 and 57—Appellant adjudicated an insolvent—Appointment of stranger to conduct the appeal in his place—Validity of order—Appeal if abates.

Where an appellant was adjudicated an insolvent after the appeal had been instituted, and a third party (other than the Official Receiver) was appointed as a special Receiver for the purpose of conducting the appeal in the place of the insolvent,

Held, that the appointment was within the power of the Court, and the appeal had not abated. S. 56 of the Provincial Insolvency Act does not operate to prohibit the Court appointing an additional Receiver for a special purpose.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to post Appeal No. 331 of 1936 preferred to the High Court against the decree of the Court of the Subordinate Judge of Bezwada

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*C.M.P. Nos. 2992, 450 and 3619 of 1938. 22nd November, 1938.

in O. S. No. 79 of 1932 for dismissal under O. 22, r. 8, Civil Procedure Code, declaring that it had abated, so far as the first appellant (first respondent) herein is concerned, etc. Gopu China Jogayya v. Manepalli Bapanayya.

N. Vasudeva Rao, K. Rajah Aiyar and *P. Satyanarayana Rao* for Petitioner.

K. V. Gopalaswami and *V. Parthasarathy* for Respondents.

The order of the Court was made by

The Chief Justice.—After this appeal had been instituted, the first appellant was adjudicated an insolvent in the District Court of Kistna at Masulipatam and Mr. V. Rama Rao, the Official Receiver of that Court, was authorised under an order dated the 25th August, 1938, to continue the appeal in the place of the first appellant. The insolvent was not able to furnish the necessary security, but his brother-in-law, Mr. Venkatakrishnayya was prepared to furnish it himself, if he were appointed a special receiver for the purpose of conducting the appeal. This was brought to the notice of the learned District Judge in a formal application later in the day, whereupon the learned District Judge cancelled his previous order and appointed Mr. Venkatakrishnayya as receiver for the purpose of the appeal. The first respondent in the appeal has filed a petition (No. 2992 of 1938) asking the Court to declare that the appeal has abated so far as the first appellant is concerned, the contention being that the District Court had no power to appoint any one but the Official Receiver to take the place of the insolvent. Leach, C.J.

S. 56 of the Provincial Insolvency Act states that the Court may, at the time of the order of adjudication, or at any time afterwards, appoint a receiver for the property of the insolvent, and such property shall thereupon vest in the receiver. It is conceded that, under this section the Court if it wished could appoint two or more persons as receivers, but it is said that, when a receiver or receivers have been appointed under the section, only he or they can act on behalf of the insolvent. In our opinion, the section does not operate to prohibit the Court appointing an additional receiver for a special purpose. S. 57 of the Act confers upon the Local Government the power to appoint Official Receivers to act within such local limits as it

Gopu China Jogayya v. Manepalli Bapanayya.

Leach, C. J.

may prescribe and states that, where any Official Receiver has been so appointed for the local limits of the jurisdiction of any Court having jurisdiction under the Act, he shall be the receiver for the purpose of every order appointing a receiver or an *interim* receiver issued by any such Court, unless the Court for special reasons otherwise directs. Therefore the act clearly contemplates the appointment of some one other than the Official Receiver in special circumstances and we consider that the Court has power to appoint an additional receiver when the case demands it. The Court has passed an order appointing a special receiver to represent the estate in the present appeal. All that the law requires is that the estate shall be represented by a receiver appointed in the insolvency proceedings and the appointment has been made. In these circumstances, we refuse the application filed by the first respondent for an order declaring the abatement of the appeal. The appeal has not abated and as there is before us a petition by Mr. Venkatakrishnayya, the special receiver, asking that he be added as an appellant, we direct that his name be brought on the record in the place of the name of the insolvent.

There is also before us an application by the first respondent for an order directing the new appellant to furnish security for costs. This application is unopposed. The first respondent asks that security be ordered in the sum of Rs. 2,235 of which Rs. 1,735 represents the costs awarded to him in the trial Court and the balance of Rs. 500 the estimated costs of the appeal. By an order of the trial Court the costs awarded to the first respondent were made a charge on certain properties of the insolvent. The first respondent asks for a further order in respect of the trial Court costs as he states that a petition for the revision of that order has been filed in this Court. We are informed by the learned Advocate for the insolvent that that application has been returned to him by the Court and that it is not intended to re-file it. In these circumstances, we consider that the proper order to make now is that the special receiver shall deposit in this Court a sum of Rs. 500 as security for the costs in the appeal of the first respondent. Ten days time will be allowed for the payment of the money.

The special receiver is entitled to his costs in the application by the first respondent for an order declaring that the

Gopu China Jogayya v. Manepalli Bapanayya.

Leach, C.J.

appeal has abated and the first respondent will get his costs as against the special receiver in the application for an order directing him to furnish security for costs. There will be no order as to costs on the formal application made by the special receiver for an order directing that his name be brought on the record.

K.C. —— *Application allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING.

Madhavi Amma and others .. *Appellants** (*Defendants 1 to 3*)

v.

Kongot Patinhare Pathayapuratarwattil Chirudevi Amma's son Nagappan Nair and others .. *Respondents* (*Plaintiff and Defendants 4 to 6*).

Madhavi Amma v. Nagappan Nair.

Malabar Marumakkathayam Act (XXII of 1933), S. 43—Suit for partition—Prior application to Collector to register the tarwad as impartible—Suit not incompetent—Collector's enquiry whether coming within the scope of S. 52 of the Transfer of Property Act (IV of 1882).

The right to partition granted by Chapter VI of Act XXII of 1933 cannot be taken away until the actual registration by the Collector under S 43, and any exercise of that right which has been carried into effect before registration is not affected by it.

There is no sufficiently express language used in the Act to bring the ..tor's enquiry within the scope of S. 52 of the Transfer of Property Act.

Appeal against the order of the District Court of South Malabar dated 8th July, 1936 and made in A. S. No. 55 of 1935 preferred against the decree of the Court of the District Munsiff of Alatur dated 3rd September, 1934, in O. S. No. 409 of 1933.

B. Sitarama Rao for Appellants.

Ch. Raghava Rao and *M. Chinnappan Nair* for Respondents.

The Court delivered the following

JUDGMENT.—This appeal raises the question of the interpretation of certain sections in the Marumakkathayam Act (XXII of 1933). The appellants in this appeal were defendants in a suit for partition filed under this Act by the plaintiff who represented one tavazhi of a tarwad in South Malabar. The suit was filed on the 23rd October, 1933. Prior to filing that suit, the plaintiff had received notice of an application made

* A. A. O. No. 435 of 1936. 7th October, 1938.

Madhavi Amma v. Nagappan Nair.

under S. 43 of the Act, to the Collector for the registration of the tarwad as impartible. While the suit was pending, the Collector did register the tarwad as impartible on the 15th January, 1934. The question which then arose before the learned District Munsiff who was trying the suit as whether the order of the Collector registering the tarwad as impartible rendered the suit incompetent. The District Munsiff held that it did so render it but upon appeal to the learned District Judge, the opposite view was taken and the Judge remanded the suit for disposal upon its merits. This is now an appeal by the defendants against that order of remand.

The disposal of the appeal turns essentially upon the true construction of sub-S. (4) of S. 43 of the Act. Sub-S. (3) prescribes the conditions under which the Collector can register the tarwad as impartible and then sub-S. (4) goes on to enact as follows:—

"On such registration, the provisions of Chapter VI shall not apply to such tarwad unless and until the registration is cancelled under S. 44."

The provisions of Chapter VI give to the members of the tarwad the right of partition. It is quite clear (see *Kunchi Amma* v. *Minakshi Ammal*[1]) that that right is actually exercised at the very moment when one of such members files a suit. In the present case, therefore, the rights granted by Chapter VI had already been exercised before the Collector registered the tarwad as impartible. It is argued that the order registering the tarwad as impartible should be read as referring back to the date of the application. It seems to me impossible to accept this view of the section on the plain meaning of the expression "on such registration". Mr. Sitarama Rao, however, argues that his contention is reasonable because the only point which the Collector has to decide is whether more than two-thirds of the members of the tarwad actually signed the application to him. I agree that the argument is a reasonable one if all the Collector has to decide is the intention and attitude of the members of the tarwad on the date of the application. But a further scrutiny of S. 43 (3) will show that the Collector must also be satisfied that on the date when he does register the tarwad as impartible, they are of the same mind as they were when they signed the petition:—

"If, after giving notice to all the major members of the tarwad and

1. (1935) 70 M.L.J. 114: I.L.R. 59 Mad. 693.

Madhavi Amma *v.* Nagappan Nair.

making such enquiry as he deems fit, the Collector is satisfied that not less than two-thirds of the major members of the tarwad have signed the petition with their free consent and desire" (it is to be particularly noted that the present tense is used here), "the registration of the tarwad as impartible, he shall register the tarwad as impartible."

I am therefore clearly of opinion that the right to partition granted by Chapter VI cannot be taken away until the actual registration by the Collector under S. 43 and that any exercise of that right which has been carried into effect before registration is not affected by it. Finally Mr. Sitarama Rao argues that the whole question is subject to the provisions of S. 52 of the Transfer of Property Act. It is true that for certain purposes S. 45 does invest the Collector under this Chapter with the powers of a Court and declares that the proceeding before him shall be deemed to be a judicial proceeding. But I am not satisfied that there is sufficiently express language here used to bring the Collector's enquiry within the scope of S. 52 of the Transfer of Property Act. There is no authority yet available in support of this argument, and I see no reason why I should accept it.

In the result, the order of the learned District Judge seems to me to be right and this appeal fails, and is dismissed with costs.

Leave to appeal granted.

K. C. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

Kodandarama Reddiar .. *Appellant* (Petitioner)*

v.

P. Parthasarathi Aiyangar and another .. *Respondents (Respondents 1 and 2).*

Kodandarama Reddiar *v.* Parthasarathi Aiyangar.

Civil Procedure Code (V of 1908), O. 21, r. 22—Notice of execution petition to a minor judgment-debtor represented by another—Judgment-debtor not actually minor—Facts not known to Court or decree-holder—Notice sufficient within the meaning of section.

Where notice of an execution petition was taken out to a person as a minor represented by his father though at that time actually he was a major but the fact was not known to the Court nor according to its finding to the decree-holder,

* A.A.O. No. 75 of 1936. 23rd August, 1938.

Kodandarama Reddiar v. Parthasarathi Aiyangar.

Held, that such a notice was sufficient compliance within the requirements of O. 21, r. 22, and that no question of jurisdiction arose even if the facts subsequently showed that the person was not a minor but a major and that the issuing of the notice might amount to an irregularity.

Tanguturi Jagannadham v. *Seshagiri Rao*, (1916) 20 M.L.T. 479 and *Rajagopala Aiyar* v. *Ramanujachariar*, (1923) 46 M.L.J. 104: I.L.R. 47 Mad. 288 (F.B.), distinguished.

Appeal against the order of the Court of the Subordinate Judge, Chingleput, dated 16th January, 1936 and made in M. P. No. 100 of 1935 in E.P. No. 120 of 1934 in O. S. No. 10 of 1930.

Srinivasaraghavan and *Thiyagarajan* for Appellant.

E. R. Krishnan for Respondents.

The judgment of the Court was delivered by

King, J.

King, J.—This is an appeal against an order of the learned Subordinate Judge of Chingleput refusing to set aside a sale under O. 21, r. 90 of the Civil Procedure Code. The appellant was the second judgment-debtor, the son of the first judgment-debtor. Notice of the execution petition was taken out to him as a minor represented by his father the first judgment-debtor as his guardian. At that time, it is now conceded, he was actually a major but that fact was not known to the Court nor according to its finding, to the decree-holder. The contention of the appellant before the learned Subordinate Judge and again before us was that inasmuch as no notice was issued to him in his capacity as a major, the sale was altogether null and void. In support of this contention, the learned Advocate for the appellant has relied upon two rulings of this High Court reported in *Tanguturi Jagannadham* v. *Seshagiri Rao*[1] and *Rajagopala Aiyar* v. *Ramanujachariar*[2]. The first case is one in which there was only a single judgment-debtor. Even there all that was decided was that the judgment-debtor could take as his cause of action for suit to set aside a sale, the fact that no notice had been served upon him as a major. The learned Judges who decided the case went on to point out that there would be a good defence open in such a suit if the defendant could show that the plaintiff, although he had not received formal notice as major, was actually aware of the existence of the execution proceedings and could have intervened to prevent the sale and deliberately refused to do so.

1. (1916) 20 M.L.T. 479.
2. (1923) 46 M.L.J. 104: I.L.R. 47 Mad. 288 (F.B.).

Kodandarama Reddiar v. Parthasarathi Aiyangar.

King, J.

It is obvious that if such a defence were open it is impossible to maintain in all its rigour the proposition of law that the issue of notice to a major as if he were a minor is necessarily fatal to further proceedings in execution. In the second case in *Rajagopala Aiyar* v. *Ramanujachariar*[1], there were two separate defendants, the first and the third. It is clearly stated that no notice of any kind was issued to the third defendant. It was therefore held that the Court had refused to carry out the plain duty imposed upon it by O. 21, r. 22 and had no jurisdiction to conduct the sale subsequently. To us there seems to be very clear distinction between a case in which no notice is issued at all to a particular defendant and a case in which notice is issued to him as if he were still a minor, the reason for issuing such notice being that both the decree-holder and the Court were unaware of the true age of the defendant. We think that to issue such a notice is a sufficient compliance with the requirements of O. 21, r. 22, Civil Procedure Code and that no question of jurisdiction arises though if the facts subsequently show that the defendant was not a minor but a major and the issuing of the notice might amount to an irregularity.

The question then arises whether the occurrence of such an irregularity has resulted in the present case in substantial loss to the appellant. The learned Subordinate Judge has held that there is no substantial loss at all. This part of the case has not been very seriously pressed before us. It is true that witnesses have appeared who estimate the value of the property at many times the price which it fetched, but there are no title deeds or other documents relating to the property itself; nor was any person called who was prepared there and then to buy the property at the value which he put upon it. Even however if it be asserted that the price fetched was a low one, the appellant has still failed to prove that the omission to issue special notice to himself as major has brought about this result. Throughout his evidence there is no hint of any special measures which he would have undertaken had he received this formal notice. The learned Subordinate Judge believes, and we see no reason to differ from him, that the appellant was all along aware of the execution proceedings and

1. (1923) 46 M.L.J. 104: I.L.R. 47 Mad. 288 (F.B.).

Kodandarama Reddiar v. Parthasarathi Aiyangar. — King, J.

that he has been deliberately put forward by his father to file this petition.

In the result we see no reason at all to differ from the order of the learned Subordinate Judge and we dismiss the appeal with costs.

K.C. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Civil Jurisdiction.]

PRESENT:—MR. JUSTICE GENTLE.

Chidambaram, minor represented by his maternal grandfather Natesa Mudaliar as his next friend .. *Applicant**

v.

Nataraja Mudaliar and others .. *Respondents.*

Chidambaram v. Nataraja Mudaliar.

Civil Procedure Code (V of 1908), O. 39, r. 7—Suit—Petition for leave to sue in forma pauperis*—Application under O. 39, r. 7, Civil Procedure Code (V of 1908)—Whether maintainable.*

In a suit by the applicant leave to sue *in forma pauperis* was applied for by him and before such leave was obtained an application for appointment of a Commissioner for taking an inventory of movable properties in the suit was filed and the question arose whether there was a suit pending at all inasmuch as the right of the applicant to apply only existed under O. 39, r. 7, Civil Procedure Code, which implied the existence of a suit and of parties ranged on either side,

Held, that following *Skinner* v. *Orde*, (1879) L.R. 6 I.A. 126: I.L.R. 2 All. 241 (P.C.), which held that on the presentation of a petition for leave to sue *in forma pauperis* the suit should be deemed to have been instituted on that date and therefore parties should be existing, the parties being those persons cited in the copy of the plaint filed along with the petition, the application for a Commissioner to take inventory of movables was properly made within the meaning of the r 7 of O. 39, Civil Procedure Code.

A. B. Nambiar for Applicant.

The Court made the following

ORDER.—In this application the applicants desire that an order may be made for the appointment of a Commissioner for the taking of an inventory of the movable properties at premises No. 15, Kuppumuthu Street, Triplicane, Madras. I am satisfied on the merits that the applicant is entitled to the

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* Application Nos. 30 and 49 of 1938 in C.S. No. 97 of 1938. 11th January, 1938.

Chidambaram v. Nataraja Mudaliar.

appointment of such a Commissioner. This application is made after the filing of a petition for leave to sue *in forma pauperis* and before leave has been granted as prayed for in that petition. The question is whether there is a suit pending inasmuch as the right of the applicant to apply for the appointment of a Commissioner arises under O. 39, r. 7, Civil Procedure Code, in which the following words appear:

"The Court may on the application of any party to a suit, ... make an order."

If there is no suit, then there can be no parties and if there are no parties to a suit, this Court is unable to make an order appointing a Commissioner. This same matter came on before me in Application No. 1849 of 1937 and upon the arguments and authorities then placed before me, I came to the conclusion that the parties in a contemplated pauper suit whose petition to have their suit admitted under the provisions of O. 33, Civil Procedure Code, were not entitled to the relief of appointment of a Commissioner or receiver inasmuch as no suit was in existence unless and until the petition to be admitted as a pauper was granted. In the application I have just mentioned, my attention was not directed to a decision of the Privy Council reported in *Skinner* v. *Orde*[1]. In that case, their Lordships of the Privy Council discussed at length the date when a pauper suit commences, and at page 136 the following conclusion is expressed:

"In their view the petition to sue as a pauper became a plaint, and under this statute the suit must be deemed to be instituted when that application was filed."

The statute referred to is the Statute of Limitations, Act IX of 1871, cl. 4. Had my attention been drawn in the previous application, to this authority of the Privy Council, my view would have been different from that expressed therein. In my view, on the authority of the above decision, on the presentation of the petition to sue as a pauper, the suit is to be deemed to have been instituted, and therefore there must be parties, the parties being those persons cited in the copy of the plaint filed with the petition. I therefore desire to reconsider the decision in Application No. 1849 of 1937. There will be an order for the appointment of a Commissioner to take an inventory of the movable property consisting of jewellery, cash,

1. (1879) L.R. 6 I.A. 126: I.L.R. 2 All. 241 (P.C.).

Chidambaram v. Nataraja Mudaliar.

silverware, and other items in the possession of the second defendant, Amirthammal, and to be found in premises No. 15, Kuppumuthu Street, Triplicane, Madras. This appointment will be conditional upon Mr. A. B. Nambiar undertaking to me to pay into Court by the 15th January, 1938, the sum of Rs. 50 in respect of the remuneration of the Commissioner. Mr. M.V. Ganapathi, an Advocate of this Court, is appointed the Commissioner. This order can be drawn up and issued forthwith.

K. C. —— *Petition allowed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Lahore.]

PRESENT:—LORD WRIGHT, LORD ROMER, LORD PORTER, SIR SHADI LAL AND SIR GEORGE RANKIN.

Srimati Premila Devi and others .. *Appellants**

v.

The Peoples Bank of Northern India, Limited (in liquidation) .. *Respondents.*

P.C.

Srimati Premila Devi v. Peoples Bank of Northern India, Ltd.

Company—Scheme of arrangement sanctioned by Court—Shares partly paid up—Provision in scheme for dates for payment of remaining calls—Resolution of directors altering dates for payment—Whether ultra vires—*Non-payment of calls by substituted dates—Forfeiture of shares—Whether valid—Subsequent winding up of company—Whether owners of forfeited shares to be included in list of contributories*

A scheme of arrangement drawn up in respect of a company and confirmed by the Court becomes thereupon binding upon the company, its creditors, and its shareholders, and it can consequently only be varied by order of the Court and after the terms of the proposed variation have been approved at meetings respectively of the creditors and the shareholders. Accordingly, if the company or its directors purport to alter the dates by which under a scheme as sanctioned certain calls in respect of shares are to be paid, that alteration is invalid, and any forfeiture of the shares for non-payment of the calls on the substituted dates is *ultra vires*, and will be inoperative to prevent the holders of those shares from being included in the list of contributories on a subsequent winding up of the company.

In the matter of the forfeiture of shares, technicalities must be strictly observed, for, since the forfeiture of shares may result in the permanent reduction of the capital of a company, it is not merely the person whose shares are being forfeited who is entitled to insist on the strict fulfilment of the conditions prescribed for forfeiture. The escape by those whose shares have been forfeited of liability for that part of them which has not been called up is a matter of vital importance to creditors. While the latter are accordingly entitled to see that the power of forfeiting shares is exercised strictly, yet no waiver by them of their rights can confer upon the company or its directors a power of forfeiture which they did not possess.

* P. C. Appeal No. 84 of 1937. 17th October, 1938.

P C.

Srimati Premila Devi *v.* Peoples Bank of Northern India, Ltd.

To render valid an act of the directors of a company which is *ultra vires*, the acquiescence of the shareholders must be of the same extent as the consent which would have given validity from the first, namely, the acquiescence of each and every member of the company. There can be no ratification without an intention to ratify and there can be no intention to ratify an illegal act without knowledge of the illegality.

Decision of the Lahore High Court affirmed.

Consolidated appeals from a decision of the High Court, Lahore (Young, C. J. and Munroe, J.) dated 16th March, 1936, given in an application to the Court by the Official Liquidator.

J. M. Pringle for Appellants.—The directors were entirely within their rights in forfeiting the shares, since the appellants were defaulters with regard to calls under the amended scheme of arrangement. It is to be noticed that on 18th January, 1933, the instalments payable on 1st July, 1932, and 1st January, 1933, were in arrear, so that the directors could there and then have validly forfeited the shares. Any deviation from the amended scheme made by the directors was within their implied authority. Further the forfeitures were ratified by creditors and shareholders at various meetings, and the ratification can be implied from the fact that balance sheets before those meetings, and directors' reports, showed the forfeitures which had been effected. That ratification cures the defect if the forfeitures were in the first place *ultra vires*.

Lionel Cohen, K.C. and *W. Wallach* for Respondents.—The resolution of 18th January, 1933, was *ultra vires*, and the consequent forfeitures were clearly invalid as against the liquidator of the bank. The resolution purported to alter the terms of the amended scheme, but the scheme had been sanctioned by the Court; its terms were consequently not open to alteration by the directors, who could have no power to order payment of instalments in respect of the shares by dates other than those fixed in the scheme. The forfeitures being invalid for these reasons, they could not be made valid by any ratification of creditors or shareholders.

17th October, 1938. Their Lordships' judgment was delivered by

Lord Romer.

LORD ROMER.—These are three consolidated appeals from the order of the High Court of Judicature at Lahore dated the 10th March, 1936, made upon an application by the Official Liquidator of the respondents, the Peoples Bank of Northern India, Limited. The question to be determined is whether the appellants should be placed upon the list of contributories notwithstanding the fact that in the year 1933 the directors of the

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Bank purported to forfeit the appellants' shares, and removed the appellants' names from the register of members in respect thereof.

The Bank was incorporated in the year 1925 under the Indian Companies Act with a capital of 50 lacs of rupees divided into 50,000 shares of Rs. 100 each. These shares, all of which were issued, were called "A" shares. In the year 1926 the capital was increased by another 50,000 shares of Rs. 100 each, of which 25,000, called "B" shares, were then issued. In 1929 some of the remaining 25,000 shares were issued and were called "C" shares, but with these the present appeals are not concerned. On the issue of the "A" and "B" shares, Rs. 50 per share had been called up.

Of the articles of association of the Bank (before they were amended in manner hereinafter stated) those that are material for the present purpose were as follows:—

"*Article 34.—Notice requiring payment of arrears.*—Whenever any call, or instalment of a call, payable by any member shall not have been paid on the appointed day, the Company may at any time thereafter during such time as such call or instalment shall remain unpaid, send a notice requiring payment by such further day, and at such place or places where the calls of the Company are usually made payable, of such calls or instalments, in arrear, with interest thereon, at the rate of 9 per cent. per annum from the day on which such call or instalment ought to have been paid, and such notice shall state, that in the event of non-payment at the time and place appointed of the arrear incurred and interest thereon, together with such expenses (if any) as may be incurred in and about the collection or recovery of such call or instalment and interest or any of them, the share in respect of which such call was made will be forfeited without further notice.

"*Article 35.—If such notice be not complied with, the share may be forfeited.*—If the requisitions of any notice given pursuant to clause 34, shall not be complied with, any share in respect of which such notice shall have been given may, without further notice at any time thereafter, unless payment of all calls, interest and expenses, due in respect thereof has been made, be forfeited by a resolution of the Directors to that effect.

"*Article 36.—Forfeited shares to become property of the Company.*—Any shares forfeited under these Articles shall be deemed to be the property of the Company, and may be sold or re-allotted or otherwise disposed of, in such manner as the Directors shall approve.

"*Article 37.—Forfeiture may be remitted.*—Until any share so forfeited shall be sold, re-allotted or otherwise disposed of, the forfeiture thereof may, at the discretion and by a resolution of the Directors, be remitted on such terms as the Board may in their discretion think fit.

"*Article 40.—Calls to be made at the discretion of Directors.*—All calls in respect of shares shall be made at the discretion of the Directors and shall be payable to the person or persons and at the time and place or places appointed by them.

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"*Article* 44.—*Interest on calls in arrears.*—If the call or instalment of a call payable in respect of any share is not paid by the day appointed for payment thereof the holder for the time being of such share shall be liable to pay interest for the same at the rate of Rs. 9 per cent. per annum from the day appointed for payment thereof to the time of actual payment.

"*Article* 45.—*Power to receive in advance moneys uncalled.*—The Directors may, if they shall think fit, receive from any member willing to advance the same, all or any part of the moneys for the time being remaining uncalled on his share beyond the calls then actually made, and in case they shall so think fit they shall pay dividend upon the moneys so paid in advance or upon so much thereof as shall from time to time remain in advance of the calls then made upon the share, in respect of which such advance has been made, in addition to the dividend payable on such part of the Capital as is actually called and paid up.

"*Article* 46.—*Power to pay interest on advance in lieu of dividend.*—If the Directors shall see fit to receive in advance any such moneys, aforesaid, they may pay interest upon the same, or upon so much thereof as shall from time to time remain in advance of the calls, at such rate not exceeding 6 per cent. per annum as they shall think fit, such interest to be in lieu of the dividend provided by the preceding clause upon such moneys so paid in advance."

On the 29th September, 1931, the Bank suspended payment. Shortly afterwards a scheme of arrangement between the Bank, its creditors and shareholders, was prepared, and, after being approved in the usual way at meetings of the creditors and shareholders was duly sanctioned by the Court under S. 153 of the Indian Companies Act upon the 22nd December, 1931. The details of that scheme are not relevant to these appeals. But by the 25th July, 1932, it had become evident that the scheme was not likely to attain the end which its promoters had in view, namely, the successful resuscitation of the business of the Bank, and accordingly on the last-mentioned date an amended scheme of arrangement was brought before the Court. In the meantime the directors had by resolution dated the 15th March, 1932, made a call of Rs. 20 in respect of the "A" and "B" shares, of which Rs. 10 was to be paid on or before the 30th April, 1932, and Rs. 10 on or before the 20th May, 1932. The amended scheme was in due course submitted to meetings of the creditors and shareholders respectively, and having been approved by them was sanctioned by the Court on the 15th November, 1932.

The only provisions of this scheme that are relevant to the present appeals are those contained in cl. 6, which so far as material is in these terms:—

"6. That for the purposes of the revival of the Bank it be distinctly laid down that further calls on capital of 'A' and 'B' class shares of which Rs. 50

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and 25 lacs have been respectively subscribed will not exceed 25 per cent., 20 per cent. having been already called; thus leaving only a further call of 5 per cent. to be made. This 25 per cent. call will be redistributed into 5 calls of 5 per cent. each payable every half year starting from 1st July, 1932."

This clause is not expressed as clearly as it might have been, but their Lordships entertain no doubt as to its meaning. Before the month of March, 1932, Rs. 50 had been called up on each of the "A" and "B" shares. On the 15th of that month, a further Rs. 20 had been called up as already stated. The clause provided that for the purpose of the revival of the Bank—that is, for the purpose of the scheme—a further call of Rs. 5 should be made in respect of such shares and no more. Had the clause stopped there, the dates for payment of the Rs. 20 call would have been those already fixed by the directors, namely, as to Rs. 10 thereof the 30th April, 1932, and as to the remaining Rs. 10 the 20th May, 1932. The further call of Rs. 5 would have become payable on such date as might be fixed by the directors when making the call under Art. 40. But the clause went on to fix the dates on which both the Rs. 20 call already made and the Rs. 5 to be made thereafter should be paid. The whole 25 per cent. was "redistributed" and was to be paid in five instalments of 5 per cent. each payable on the 1st July, 1932, the 1st January, 1933, the 1st July, 1933, the 1st January, 1934, and the 1st July, 1934. It only remained for the directors to pass a resolution making the further call of Rs. 5 under Art. 40, and such call would by virtue of the scheme become payable on the 1st July, 1934. No further resolution was necessary in respect of the Rs. 20. In the words of cl. 6, it had "already been called." The resolution of the 15th March, 1932, therefore, remained unaffected except that the dates for the payment of the Rs. 20 were altered.

It is to be observed that one effect of the amended scheme when it came into operation on the 15th November, 1932, was to make the instalment payable on the 1st July, 1932, a call in arrear. Another effect was that "A" and "B" shareholders who had punctually paid the call made on the 15th March, 1932, were probably entitled to be treated as having paid moneys on their shares in advance of calls within the meaning of Arts. 45 and 46. These circumstances no doubt introduced some complication into the matter. But it was nothing compared to the complications introduced by the subsequent proceedings of the directors to which attention must now be called. On the 18th

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January, 1933, they held a board meeting. Their Lordships regret to say that the record of proceedings supplied to them on these appeals would seem to have been prepared with the view of making the discovery of any particular document as laborious a task as possible. But a diligent search (for no assistance will be obtained from the index of reference), will reveal a minute of this board meeting. According to this minute the directors, after referring to cl. 6 of the scheme, and recording the fact that many shareholders had made default in payment of the 10 per cent. calls made in the preceding March in whole or in part, passed the following resolutions:—

"(*a*) That the remaining call of 5 per cent. on 'A' and 'B' shares as provided for in cl. 6 of the Annexure A be made now under Art. 34 payable on or before the 26th February, 1933, and that these shareholders who are partly or wholly in default of already outstanding calls should be called upon under Art. 35 to pay up the arrears due with interest at 9 per cent. per annum calculated from due dates to 31st January, 1933; at the registered office of the company at Lahore, Bharat Buildings, on or before the 26th day of February, 1933, in office hours, and that notices to this effect as required by Arts. 34 and 35 respectively be served on all 'A' and 'B' shareholders and also on the defaulters, intimating to the latter, that is, defaulters at the same time that in the event of non-payment at the time and place appointed all the arrears incurred and interest thereon together with such expenses (if any) as may be incurred in and about the collection or recovery of such calls and interest or any other, the share in respect of which such calls were made will be forfeited without further notice; and that a meeting of the Board will be held on 27th February, 1933, to effect forfeiture of the defaulters of the two 10 per cent. calls and the 5 per cent. call or any of them; and that to the defaulters who pay up at least 5 per cent. on account of three calls (two of 10 per cent. each of 15th March, 1932, and one of 5 per cent. of 18th January, 1933), made before the 26th February, 1933, as an instalment under cl. 6 of the revised scheme.

"(*b*) A compromise under Art. 37 be offered to those shareholders who accept the following terms in regard to the amounts due on account of three calls totalling 25 per cent. and interest due up to 31st January, 1933, in terms of cl. 6 of the Annexure A and but having paid 5 per cent. as per terms of compromise proposed before the 26th February, 1933, and agreeing to pay the remaining 20 per cent. of calls and interest due as above cited:—

" 5¼ per cent. on all shares held by him on or before 15th June, 1933.

" 5¼ per cent. on all shares held by him on or before 15th December, 1933.

" 5¼ per cent. on all shares held by him on or before 15th June, 1934.

" 5¼ per cent. on all shares held by him on or before 15th December, 1934.

at the Head Office of the Bank between office hours on working days and further agreeing that in the event of making a default in any of the instalments as fixed here above, the Banks Board could take the action as provided for in Arts. 34, 35 and 36 of the Banks Articles of Association."

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These resolutions betray a complete misappreciation on the part of the directors of cl. 6 of the scheme. They had no right whatsoever to make the remaining call of 5 per cent. payable on or before the 26th February, 1933. It is moreover, quite apparent that in passing this resolution they treated the clause as in no way affecting the dates originally fixed for payment of the 20 per cent. call made in March, 1932, and that they were requiring payment of the whole of this call (so far as not already paid) on or before the 26th Februaiy, 1933. This again they had no right to do. The most that they could have done in respect of this 20 per cent. call was to send a notice under Art. 34 requiring payment by the 26th February, 1933, of the two instalments of 5 per cent. payable on the 1st July, 1932, and the 1st January, 1933, with interest at 9 per cent. per annum from those dates respectively, with an intimation that the shares would be forfeited in default of payment of such instalments, interest and expenses as mentioned in the article. It would also have been within the competence of the directors after any such forfeiture to offer a compromise under Art. 37 to those members who had paid 5 per cent. before the 26th February, 1933. But they would have had no conceivable right to make it a term of such compromise that the instalments that were payable under the scheme on the 1st July, 1933, the 1st January, 1934, and the 1st July, 1934, should be paid on any other dates.

It is perhaps understandable that the directors should have failed to appreciate the true effect of cl. 6 of the scheme and have thought that it in no way altered the dates for payment of the 20 per cent. call made in March, 1933. What is not so understandable is that, entertaining the views they did as to the meaning of the clause they should at the same meeting have passed the following resolution:—

"Resolved that the following sub-clauses be added to Art. 46 (by two extraordinary general meetings).

"That such shareholders who had paid the 20 per cent. of two calls 10 per cent. each payable on 30th April, 1932, and 20th May, 1932), before the 18th January, 1933, shall be paid interest at the rate of 6 per cent. per annum from date of payment up to 31st January, 1933, and thereafter interest will run on the non-adjusted balance out of the remaining 15 per cent. as per cl. 3 hereof at the rate of 6 per cent. per annum under Art. 46 treating the balances at any time as an advance.

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Art. 46 was subsequently amended in accordance with this resolution. What may be the meaning of the words "non-adjusted balance out of the remaining 15 per cent. as per cl. 3" their Lordships are quite unable to determine. But it is plain that interest could only be allowed to the shareholders who had already paid the two calls of 10 per cent. if those calls were in truth payable on the 1st July, 1932, the 1st January, 1933, the 1st July, 1933, and the 1st January, 1934, instead of on the 30th April, 1932, and the 20th May, 1932; that is to say, if the dates originally fixed for payment had been altered by the scheme. The calls would not otherwise have been paid in advance. But, however this may be, the directors on the 23rd January, 1933, sent to the holders of the "A" and "B" shares a notice of the further call of 5 per cent. to be paid on or before the 26th February, 1933, stating that, in default of payment on or before that date of this further call and of the two previous calls of 10 per cent. each (which they described as payable on the 30th April and the 20th May, 1932, respectively), with interest on such two previous calls at 9 per cent. per annum from the date of the calls to the 31st January, 1933, the shares would be forfeited without any further notice. It was also stated that shares could be restored after forfeiture on the basis of the compromise mentioned in resolution (*b*) passed on the 18th January, 1933. A draft copy of the compromise was enclosed with each notice.

On the 25th March, 1933, another board meeting was held. By resolutions passed at this meeting the shares of such shareholders (including several of the present appellants) as had neither made any payment in pursuance of the notice nor accepted the terms of the compromise were forfeited. The shares of those members (including the remaining appellants) who had paid 5 per cent. on or before the 25th March, 1933, and had accepted the compromise were not forfeited at this time. But later on default was made by them in paying the instalment of 5¼ per cent. payable under the compromise on the 15th June, 1933, and by the 11th November, 1933, the shares of all the appellants had been forfeited by the directors.

On the 22nd May, 1935, an order was made for the winding up of the Bank, the Official Liquidator being appointed the liquidator. By this time the names of all the appellants had

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been removed from the register of members in respect of the shares which the directors had purported to forfeit. In the cases where the directors had been able to sell the shares the purchasers' names had been entered on the register. The Official Liquidator, however, inserted the names of all the appellants in the list of contributories, contending that their shares had not been validly forfeited and that their names had been improperly removed from the register. In order to have it determined whether this contention was well founded he applied to a Judge of the High Court of Judicature at Lahore to have the list of contributories settled by the Court. The question of principle involved was in due course referred by the learned Judge to a Division Bench consisting of the Chief Justice and Munroe, J., and they delivered their judgment on the 16th March, 1936. They held in effect that the resolutions of the directors of the 18th January, 1933, were inconsistent with cl. 6 of the amended scheme and that the forfeiture of the appellants' shares were *ultra vires* the Bank and of no effect. They rejected the contention of the appellants that the action of the directors had been ratified by the creditors and shareholders, holding that such ratification even if proved could not validate an *ultra vires* transaction. But they further held that there was no such ratification in fact. They accordingly accepted the application of the Official Liquidator and ordered the rectification of the register of members so as to include the names of the appellants and others in the like position and settled their names upon the list of contributories. From that decision the appellants, having obtained the necessary leave, now appeal to His Majesty in Council.

In their Lordships' opinion, the learned Judges of the Division Bench came to a right conclusion.

Upon confirmation by the Court of the amended scheme of arrangement that scheme became, by virtue of S. 153 of the Indian Companies Act, binding upon the creditors, the shareholders and the Bank alike. Its terms could thereafter only be varied by order of the Court after the variation had been approved at meetings of the creditors and shareholders. It was not, therefore, possible for the Bank or its directors or shareholders whether by resolution or ratification or otherwise to alter the dates fixed by cl. 6 of the scheme for payment of the 20 per cent. called up in March, 1932, or the 5 per cent. called

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up on the 18th January, 1933. It necessarily follows that the resolution of the directors on the latter date requiring the whole 25 per cent. to be paid with interest on or before the 26th February, 1933, was an attempt on their part to do something that was *ultra vires* the Bank.

The offer to the shareholders of the compromise was equally beyond the powers of the Bank or its directors. For apart from the fact that the powers conferred upon the directors by Art. 37 only arise after the share has been forfeited, neither the Bank nor its directors could vary the scheme under the guise of a compromise with a shareholder.

The resolutions (*a*) and (*b*) of the 18th January, 1933, except in so far as they made the call of 5 per cent., and the purported forfeitures of the appellants' shares that followed upon them were, therefore, inoperative and void.

It was said on behal' .he appellants that, inasmuch as on the 18th January, 1' , the two instalments payable on the 1st July, 1932, and : .e 1st January, 1933, were in arrear, the Bank through its directors could have validly forfeited the appellants' shares. This is true. But it is plain from the terms of the resolutions of the 18th January, 1933, and of the notice sent to the shareholders on the 23rd January, 1933, and of the resolution of the 25th March, 1933, that the shares forfeited on this last date were being forfeited for default in payment of the 25 per cent. by the 26th February, 1933. This latter resolution was in these terms:—

"The shareholders in respect of the following 'A' and 'B' class shares having made default in respect of calls of 25 per cent., 20 per cent. having been called on 15th March, 1932, and 5 per cent. on 18th January, 1933, and having neither offered any compromise as allowed by the General Board Resolution No. 2 dated 18th January, 1933, nor having made any payment in terms thereof, it is hereby resolved that these shares be and are forfeited . . . . ."

It was further contended on behalf of the appellants that, inasmuch as the shares of those who had paid at least 5 per cent. by the 25th March, 1933, were not forfeited until later, and they were given further opportunities of availing themselves of the compromise, the resolution just set out should be regarded as merely forfeiting the shares for non-payment of the 5 per cent. payable on the 1st July, 1932. This in their Lordships' judgment is an impossible contention in view of the facts already detailed. It is true that, had the shareholders

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affected by the resolution paid the 5 per cent., their shares would not have been forfeited at that time. They would have been given a further opportunity of paying. But from those who had paid nothing, the directors may well have thought that nothing was likely to be obtained in the future. Their shares were accordingly then and there forfeited; they were forfeited, however, for non-payment of the 25 per cent., and not merely for non-payment of the 5 per cent.

This may seem to be somewhat technical; but in the matter of the forfeiture of shares, technicalities must be strictly observed. And it is not, as is sometimes apt to be forgotten, merely the person whose shares are being forfeited who is entitled to insist upon the strict fulfilment of the conditions prescribed for forfeiture. For the forfeiture of shares may result in a permanent reduction of the capital of a company. It will suffice to take the present case as an example. If the forfeitures are upheld the appellants remain liable, no doubt, for the whole 25 per cent. called up in March, 1932, and in January, 1933. But they will escape liability altogether in respect of the uncalled 25 per cent., and this is a matter that vitally affects the creditors. These creditors cannot be deprived of their right to have this 25 per cent. made available for payment of their debts without due cause.

The creditors are, therefore, entitled to see that the power of forfeiting shares is exercised strictly. Where the power of a company to forfeit shares has arisen, the articles of association usually contain provisions as to the sending of notices and the like that may be regarded as being inserted merely for the protection of the shareholder affected. Such provisions may properly be regarded as being directory only and capable of being waived by the individual shareholder. But no waiver by him can confer upon the company or its directors a power of forfeiture that they do not possess, as for example, a power to forfeit shares for non-payment of calls that are not yet due.

It was, however, strenuously contended on behalf of the appellants both before the High Court and before their Lordships that the forfeitures in question had been ratified by the whole body of creditors and shareholders. Such ratification, it was said, was to be implied from the fact that various balance sheets with reports thereon of the directors showing that the

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shares in question had been forfeited had been issued to the shareholders; that the forfeiture of the shares had also been mentioned and discussed at meetings both of creditors and shareholders; and 'that no creditor or shareholder had ever challenged the validity of the forfeitures.

In view, however, of the binding character of the scheme sanctioned by the Court, no variation of or departure from that scheme could be validated by the mere acquiescence of the shareholders and creditors, as has already been pointed out in an earlier part of their Lordships' judgment. But even if it be assumed that the forfeitures could be made valid by ratification, there is no evidence to which their Lordships' attention has been called to justify the conclusion that such ratification was in fact given. As was said by Lord Chelmsford in *Spackman* v. *Evans*[1]:

"To render valid a[illegible] f the directors of a company which is *ultra vires*, the acquiesc[illegible] ae shareholders must [illegible] the same extent as the consent which would have given validity fr[illegible] e first, namely, the acquiescence of each and every member of the co[illegible] ay. Of course this acquiescence cannot be presumed unless knowledge of the transaction can be brought home to every one of the remaining shareholders."

By knowledge of the transaction Lord Chelmsford clearly meant knowledge of the invalidity of the transaction. Lord Cranworth in the same case said this (p. 194):—

"Looking to all which was thus done, I should certainly hold that the conduct of the continuing shareholders amounted to a ratification of the illegal or irregular acts of the directors, provided it be clear that the shareholders knew that they were illegal or irregular. . . . "

Much to the same effect was said by Sir Barnes Peacock in delivering the judgment of this Board in the case of *Irvine* v. *Union Bank of Australia*[2]:

"Their Lordships think that it would be competent for a majority of the shareholders present . . . . at an extraordinary meeting convened for that object, and of which object due notice had been given, to ratify an act previously done by the directors in excess of their authority; and they are not prepared to say that if a report had been circulated before a half-yearly meeting distinctly giving notice that the directors had done an act in excess of their authority, and that the meeting would be asked by confirming the report to ratify the act, this might not be sufficient notice to bring the ratification within the competency of the majority of the shareholders present at the half-yearly meeting."

There can in truth be no ratification without an intention to ratify, and there can be no intention to ratify an illegal act

1. (1868) 3 H.L. 171 at 234. 2. (1877) 2 A. C. 366 at 375.

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without knowledge of the illegality. In the present case there is nothing whatsoever to show that in the balance sheets or reports or at any meeting, the attention of the creditors or shareholders was called to any illegality or irregularity in the forfeitures of the shares, or that at any material time they had any knowledge of any such illegality or irregularity. Least of all were they told that they were being invited by their silence or otherwise to ratify the forfeitures that had taken place. It was on these grounds that the plea of ratification was rejected, and in their Lordships' opinion was rightly rejected, by the learned Judges of the High Court.

A belated attempt was made by Mr. Pringle on behalf of some of the appellants to show that their shares had been forfeited not for default in payment of the calls of 25 per cent. made in March, 1932, and January, 1933, but for default in payment of the calls of 50 per cent. made on the original allotment of the "A" and "B" shares. But no such contention was put forward in the High Court or in the printed case for the appellants. The contention is indeed in flat contradiction of some of the statements made in the case. In these circumstances it is far too late to advance any such contention now.

It only remains to mention one other matter. It is said by the appellants that the liquidator is attempting to charge them with interest on the unpaid calls and that the liability of the appellants as contributories is inconsistent with liability on them to pay such interest. Upon this question their Lordships express no opinion. The only question before them is whether the appellants have been rightly placed upon the list of contributories; and this question should, in their Lordships' judgment, be answered in the affirmative. What the result of this may be is a question that will have to be determined hereafter in the course of the liquidation. It does not arise on this occasion.

Their Lordships are of opinion for the reasons they have given that these appeals should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitors for Appellants: *Hy. S. L. Polak & Co.*

Solicitors for Respondents: *Cardew, Smith & Ross.*

R.C.C. — *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE LAKSHMANA RAO.

Sivagami Ammal and others .. *Petitioners** (*Accused*)

v.

Muthu Aiyar .. *Respondent* (*Complainant*).

Sivagami Ammal *v.* Muthu Aiyar.

Child Marriage Restraint Act (XIX of 1929), S. 10—Case under—Transfer by District Magistrate to Sub-Divisional Magistrate—Absence of enquiry—Legality of procedure.

The transfer by District Magistrate of a case under the Child Marriage Restraint Act to a Sub-Divisional Magistrate for disposal according to law without himself making an enquiry under S. 202 of the Criminal Procedure Code is illegal.

Mangal Ram v. *Kalu*, (1930) I.L R 12 Lah. 383 and *The Crown* v. *Chand Mal*, (1933) I.L.R. 15 Lah. 63, referred to.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Sub-Divisional Magistrate of Tuticorin in C.C. No. 49 of 1938 dated 23rd June, 1938.

G. Gopalaswami for Petitioners.

The Public Prosecutor on behalf of the Crown.

Respondent not represented.

The Court made the following

ORDER.—S. 10 of the Child Marriage Restraint Act (XIX of 1929) provides that a Court taking cognisance of an offence under that Act should either itself make an enquiry under S. 202 of the Code of Criminal Procedure or direct a Magistrate of the First Class Subordinate to it to make such enquiry and the transfer of the case to the Sub-Divisional Magistrate for disposal according to law without any such inquiry is illegal. (Vide *Mangal Ram* v. *Kalu*[1] and *The Crown* v. *Chand Mal*[2].) The complaint is therefore transferred back to the file of the District Magistrate of Tinnevelly for disposal according to law.

K. C. —— *Petition allowed.*

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* Crl. R. C. No. 446 of 1938. 22nd September, 1938.
Crl. R.P. No. 426 of 1938.

1. (1930) I.L.R. 12 Lah. 383.
2. (1933) I.L.R. 15 Lah. 63.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

Pabbati Venkata Reddi .. *Appellant** (*Petitioner*)

v.

Doredla Venkataratnam and Sons, represented by Doredla Satyanarayanamurthi and others .. *Respondents* (*Respondents*).

Pabbati Venkata Reddi *v.* Doredla Venkataratnam & Sons.

Civil Procedure Code (V of 1908), Ss. 38 and 63—More than one decree-holder against the same property—Attachment of property by more than one Court—Application of S. 63.

S. 38 of the Civil Procedure Code is a general section dealing with execution and it contemplates only one decree-holder applying to execute only one decree and it lays down which is the proper Court to order execution. S. 63 deals with more complicated facts in which there are not only more decree-holders than one but the same property has been attached by more Courts than one. Where the facts come within definition of the situation as given by S. 63, it is obviously S. 63 which must be applied and S. 63, if the facts apply, cannot be controlled or governed by S. 38.

Appeal against the order of the Court of the Subordinate Judge of Narasapur dated 6th July, 1935 and made in C. M. P. No. 1140 of 1934 (O. S. No. 42 of 1926 on the file of the District Court, Kistna).

V. Govindarajachari and *N. Vasudeva Rao* for Appellant.

P. Satyanarayana Rao for Respondents.

The judgment of the Court was delivered by

King, J.

King, J.—This appeal raises a question of the interpretation of S. 63 of the Civil Procedure Code. The facts are that in execution of three decrees against the same judgment-debtors the same property was attached. Two of the decree-holders one of whom is the present appellant, had their decrees transferred to the Sub-Court, Narsapur. The third decree-holder, who is the present first respondent, had his decree transferred to the District Munsif of Narsapur. Subsequently action was taken under S. 63 by which the proceedings before the District Munsiff of Narsapur were called up to the Subordinate Judge's Court. The decree-holder, whose decree had been thus called up, that is to say, the first respondent, then applied to the learned Subordinate Judge to sell the attached property. The sale was duly held. Thereupon the present appellant filed an application under O. 21, r. 90, Civil Procedure Code, requesting

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* A. A. O. No. 486 of 1935. 30th August, 1938.

Pabbati Venkata Reddi v. Doredla Venkataratnam & Sons.

King, J.

the Court to set aside the sale on two grounds (1) that it was vitiated by material irregularities, and (2) that the Subordinate Judge had no jurisdiction to hold the sale at all. This application was filed on the 23rd November, 1934, whereas the sale had been held on the 9th July. The application was therefore *prima facie* out of time and the learned Subordinate Judge has held that the appellant has not pleaded in sufficient detail any fraudulent actions on the part of the respondent which would enable him to rely upon S. 18 of the Limitation Act. The learned Judge has therefore held that the application under O. 21, r. 90 is barred by limitation.

In appeal we have been asked to read into the application what is not obviously there, namely, an allegation that there has been fraudulent conduct on the part of the respondent which has prevented the appellant from having knowledge of the sale. We are unable to find any material which would form the basis for such an assertion and we think that the decision of the learned Subordinate Judge on the question of limitation is right.

The main argument however in appeal was on the question of jurisdiction. It is contended that although it was necessary under S. 63 to bring the proceedings which were then pending before the District Munsiff up to the Court of the Subordinate Judge, the Subordinate Judge has by virtue of S. 38 jurisdiction to execute only such decrees as have actually been transferred by the Court of First Instance to his Court. The question then is whether S. 63 overrides S. 38 or not on the assumption that S. 63 contains within itself any clause conferring jurisdiction upon the Subordinate Judge. We think that on a common sense interpretation of the language of S. 63 this jurisdiction is certainly conferred. The language of S. 63 is:

"Where property not in the custody of any Court is under attachment in execution of decrees of more Courts than one, the Court which shall receive or realise such property and shall determine any claim thereto, shall be the Court of highest grade."

It is conceded for the appellant that in spite of the enactment of S. 63 the Subordinate Judge in this case would have had jurisdiction to hear and determine all claim petitions. To that extent therefore it is conceded that S. 63 overrides S. 38. It is however argued that S. 63 does not give the Sub-Court any jurisdiction to sell the attached property except in execution

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of its own decrees. It seems to us that this jurisdiction is necessarily included in the use of the word "realise". "Realise such property" must obviously refer to bringing such property to sale. Nowhere in S. 63 is there any restriction as to how and in what manner and in what petition the Court of highest grade should realise the property and inasmuch as it is already conceded that S. 63 overrides S. 38 with regard to claim petitions we are of opinion that it overrides S 38 in this matter also. After all S. 38 is a general section dealing with execution. It contemplates only one decree-holder applying to execute only one decree and it lays down which is the proper Court to order execution. S. 63 deals with more complicated facts in which there are not only more decree-holders than one but the same property has been attached by more Courts than one. Where the facts come within the definition of the situation as given by S. 63 it is obviously S. 63 which must be applied and S. 63, if the facts apply, cannot, we think, be controlled or governed by S. 38. We are of opinion therefore that the Subordinate Judge in this instance had jurisdiction to conduct the sale.

The appeal must therefore fail on both points and is dismissed with costs.

K. C. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VARADACHARIAR AND MR. JUSTICE ABDUR RAHMAN.

Kaza Parandhamayya ., *Appellant* (Petitioner—3rd Judgment-debtor)*

v.

Surapaneni Veerayya and others .. *Respondents (Respondents 4 and 3 and nil, Decree-holder and 4th Judgment-debtor and nil).*

Parandhamayya v. Veerayya.

Civil Procedure Code (V of 1908), S. 47—Suit against brothers of a joint Hindu family for debt—Arbitration—Decree in terms—One of the defendants held liable and his share brought to sale—Exonerated defendants bringing an application questioning the sale to plaintiff—No locus standi *for the application.*

Where the plaintiff had obtained a decree against the fourth defendant in the suit and defendants 2 and 3 had contended that the plaintiff's claim related to a personal debt which defendant 4 as the son of the first defendant alone was liable for and that their interest in the joint family property would

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*A A A. O. No. 134 of 1934. 5th October 1938.

Parandhamayya v. Veerayya.

not be liable and the case went to arbitration and a decree was passed in terms of the award holding that only one-third share in the joint family properties belonging to the fourth defendant would be liable for the debt and defendants 2 and 3 were exonerated, but an application was taken by the third defendant to question the bringing of the fourth defendant's one-third share in the joint family properties to sale,

Held, that the third defendant had no *locus standi* to bring in his application, as there were no proceedings taken against the third defendant and the sale against the fourth defendant had also become final.

Chhotey Lal v. *Ganpat Rai*, (1934) I.L.R. 57 All. 176 at 201 (F. B.), followed.

Appeal against the order of the District Court of Kistna at Masulipatam dated the 2th day of August, 1934 and made in A. S. No. 220 of 1933 preferred against the order of the Court of the District Munsiff of Gudivada, dated 16th September, 1933 and made in C. M P No 1916 of 1933 in O. S. No. 316 of 1929.

P. Satyanarayana Rao for Appellant.

A. Lakshmayya for Respondents

The judgment of the Court was delivered by

Varadachariar, J.

Varadachariar, J.—This second appeal arises out of an application filed by the third defendant in the suit, objecting to the sale of certain properties at the instance of the plaintiff who had obtained a decree against the fourth defendant in the suit. The suit had been instituted against three defendants of whom the first defendant and the third defendant were the sons of the second defendant. As the first defendant died pending the suit his son the fourth defendant was added as his legal representative. Defendants 2 and 3 contended that the debt incurred by the first defendant was a personal debt of his and that they and their interests in the joint family property could not be held liable therefor. The case went to arbitration and a decree passed in terms of the award held that only the one-third share which the fourth defendant (as the son of the first defendant) had in the joint family property was liable for the suit debt. Defendants 2 and 3 were exonerated. It is the attempt of the plaintiff to bring the fourth defendant's one-third share to sale that is now contested by the application under appeal

At the outset, we would observe that the applicant has, in our opinion, no *locus standi* to present this application. Assuming for the sake of argument that for the purpose of S. 47, Civil Procedure Code, even an exonerated defendant is a party to the

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Varadachariar, J.

suit, the question still remains whether he has a *locus standi* to pray for particular reliefs. No proceedings are now sought to be taken against the third defendant or his interests in the family property. We have also been informed that proceedings taken on behalf of the fourth defendant to question the sale have failed and we presume that as against the fourth defendant the sale has become final. The mere fact that the petitioner is an undivided member of the coparcenary of which the fourth defendant is also a member will not suffice to give the petitioner a *locus standi* to maintain the present application (*see* the observations of Sulaiman, C. J., in *Chhotey Lal* v. *Ganpat Rai*[1]).

In these proceedings, the appellant has sought to bring in the question of the date of the confirmation order with a view to contend that the interim attachment before judgment made during the first defendant's lifetime became wholly inoperative because no decree was passed during his lifetime. We have not been shown any warrant for this contention. Reference was made in this connection to the line of authorities in this Court dealing with the effect of attachment before judgment in personal actions against individual coparceners who happen to die before judgment. It seems to us that this line of authorities has no bearing upon the question arising in the case. Nothing turned in those cases on the question whether there was only an *interim* attachment during the original defendant's lifetime or also an order of confirmation. The point for decision in those cases related to the liability of the coparceners to whom the undivided share of the defendant coparcener survived on his death. The question of liability arose in those cases because under the Hindu Law no coparcener other than a male descendant will be liable for the personal debts of a deceased coparcener when the latter's share in the joint family property survived to him, but an exception was made in cases where the share of the deceased had been effectively attached during his lifetime. No such question can arise in a case where the deceased coparcener has left a son, because the son's share will be liable for the father's debt notwithstanding that it might have come to him by survivorship or by birth and even in the absence of any attachment obtained during the father's lifetime.

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1. (1934) I.L.R. 57 All. 176 at 201 (F.B.).

Parandhamayya v. Veerayya.

Varadachariar, J.

It accordingly seems to us immaterial in these proceedings that the first defendant died before the decree was pronounced. The appeal fails and is dismissed with costs.

K. C. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING.

The Co-operative Society, Virapandy by its President, M. Palanichami Pillai .. *Appellant** (*Defendant*)

v.

R. M. Lakshmanan Chettiar .. *Respondent* (*Plaintiff*).

Co-operative Society, Virapandy v. Lakshmanan Chettiar.

Madras Co-operative Societies Act (VI of 1932), S. 51, sub-Ss. (5) *and* (6)—*Mortgage by a member to society giving a survey number—Award by arbitrator—Subsequent attachment of another survey number in execution of a money decree against the member in a Civil Court—Letter by the President of the Co-operative Society to the Deputy Registrar that the latter is the correct number of the mortgaged property, for amending the award by giving this number—Amendment by the Deputy Registrar after notice to the member but without notice to the executing creditor—Executing creditor buying the attached property in execution—Society buying the same property subsequently and obtaining possession—Amendment by the Deputy Registrar if can be questioned in the Civil Court under S.* 51 (6) *of the Act—Right of execution-purchaser to redeem the property.*

A Co-operative Society took a mortgage of a property described by a survey number from one of its members and obtained an award directing the sale of the same from an arbitrator. Then a simple creditor of the same member obtained a money decree against him in a Civil Court and attached another survey number in execution. Then the President of the Co-operative Society wrote to the Deputy Registrar saying that the correct survey number of the mortgaged property was the latter and asked him to amend the award by inserting that survey number in the award. The Deputy Registrar amended the award after notice to the member but without notice to the attaching decree-holder. The attaching decree-holder purchased the property in execution and subsequently the Society bought the same in execution of the award and got possession of it. In a suit for possession by the money decree-holder purchaser against the society,

Held, that the order of amendment by the Deputy Registrar was one passed by him under the powers of revision vested in him under S. 51 (5) of the Madras Co-operative Societies Act and the same was not liable to be questioned in the Civil Court by reason of S. 51 (6) of the Act.

Held also, that the money decree-holder purchaser was entitled to redeem the property from the Co-operative Society.

Appeal against the order of the Court of the Subordinate Judge of Dindigul dated 27th February, 1937 and made in

* A.A.O. No. 166 of 1937. 28th October, 1938.

Co-operative Society, Virapandy v. Lakshmanan Chettiar.

Appeal No. 76 of 1936 preferred against the decree of the Court of the District Munsiff of Periyakulam in O.S. No. 196 of 1935.

M. Krishna Bharathi and *M. Chockalingam* for Appellant.

C. A. Seshagiri Sastri for Respondent.

The Court delivered the following

JUDGMENT.—This appeal arises out of an instrument of mortgage executed by one Minakshisundaram Pillai in favour of the appellant, a Co-operative Society in Veerapandi. The items of property entered in the mortgage were S. Nos. 1167/1 and 1167/4. The matter was referred by the Society to the Deputy Registrar who in his turn referred it to an arbitrator who passed an award in July, 1932, declaring the mortgage to be good against these two items. About two years later, it appears to have been discovered that S. No. 1167/1 was a wrong number in the mortgage deed and that the correct number ought to have been 1175/3. A reference was made to the Deputy Registrar to amend the decision of the arbitrator accordingly and the Deputy Registrar after consulting the mortgagor has so amended the decision. This amendment took place in June, 1934, and sometime later, the Society brought an execution application on the strength of the amended award and purchased the mortgaged property including 1175/3 on 13th December, 1934. Meanwhile, the present respondent had also acquired rights in this property. He obtained a decree against the mortgagor and his sons and in the course of execution that decree attached 1175/3 and subsequently brought it to sale and purchased it himself on the 19th July, 1934.

The main question which has arisen in this appeal is: Whether the order of the Deputy Registrar substituting 1175/3 for 1167/1 in the original award filed by the arbitrator is an order under S. 51 (5) of the Co-operative Societies Act. If it is such an order, then, according to the provisions of S. 51 (c), it cannot be called in question in any Civil Court. The provisions of S. 51 (5) are as follows:—

"The Registrar may, of his own motion, or on the application of a party to a reference, revise any decision thereon by the person to whom such reference was transferred or by the arbitrator or arbitrators to whom it was referred."

The learned Subordinate Judge who passed the first appellate decree in this case has held that the action of the Deputy Registrar was not taken under S. 51 (5), that it is therefore not

final and that the question, whether the mortgage is good with reference to 1175/3 or not, is one which must be remanded to the first Court for disposal.

Co-operative Society, Virapandy v. Lakshmanan Chettiar.

In the appeal it is contended by the Society that as already mentioned, the decision falls under S. 51 (5) and is final. There are no authorities on this point and it will depend entirely upon what is meant by the words, "Revise any decision". The learned Subordinate Judge seems to me, to have given too narrow a meaning to the word "revise". He seems to think that 'revise' has a special legal meaning of taking proceedings in revision, and that some such rules as govern the interference by a Revisional Court are the rules which alone would govern any interference by the Registrar. It seems to me that the word 'revise' was here used in the widest sense as practically equivalent to 'correct' or 'amend' and that it is not necessarily because some important point of law is raised, but because of any kind of error, however simple it may appear that the revisional jurisdiction can be invoked. In the wider sense of the term 'revise' it is of course obvious that to substitute one figure for another is an act of revision. It is however argued for the respondent here that there is no actual positive reference made either by the Society or by the Registrar to this particular sub-section in their correspondence and proceedings. That again seems to me quite immaterial as also is the fact that for some reason or other, the notice issued by the Registrar was headed as under S. 38. It is agreed that the Registrar cannot possibly have acted in the matter of this decision under S. 38, or indeed under any other section of the Act, and although he might not have consulted the Act before he drew up his proceedings, it cannot seriously be contended that he had no jurisdiction to correct the figure. It seems to me obvious that the Registrar has done something which S. 51 (5) of the Act empowered him to do, and therefore, whether he had or had not the source of his powers consciously before his mind at the time he made his decision, that decision must be deemed to have been made under this sub-section. It follows therefore that his decision is final and the mortgage has been held good with reference to 1175/3, secured against any challenge by the respondent in this appeal.

The suit here was by the respondent to recover possession of 1175/3 from the Society. The Society actually took delivery of the property in March, 1935. As already mentioned, the

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purchase by the respondent in execution of his decree was in July, 1934 and the purchase by the Society was in December, 1934. On a question of priority of date, therefore, it is quite clear that the title of the respondent to the equity of redemption in respect of this piece of property cannot be assailed. I have already held that under the provisions of the Co-operative Societies Act, the title of the Co-operative Society as mortgagee is equally unassailable.

In the result, the only proper order, it seems to me to pass is to set aside the decrees of both the Courts below and to remand the suit to the first Court with directions to frame a suitable decree for redemption of this mortgage by the defendant. The appellant's costs throughout must be paid by the respondent.

K. C. ——— *Appeal remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Sri Rajah Bommadevara Venkatarayulu Naidu Bahadur Zamindar Garu .. *Appellant** *(Plaintiff and Petitioner).*

v.

Sri Rajah Lanka Venkata Rattamma Garu .. *Respondent (Defendant and Respondent).*

Venkatarayulu Naidu Bahadur v. Venkata Rattamma.

Review—Error of law—Lack of jurisdiction obvious on the face of the record—Fit case for review.

Where there is an error of law, which obviously and without research into the rulings involves a lack of jurisdiction to pass the order of which review is sought, it is eminently a case in which the error, though technically an error of law, is apparent on the face of the record and should be corrected at the earliest possible time without driving the parties to the expense of an appeal or revision petition to which there would be no answer.

Murari Rao v. *Balavanth Dikshit,* (1923) 45 M.L.J. 309: I.L.R. 46 Mad. 955 and *Lahiri & Co.* v. *Makhan Lal Basak,* A.I.R. 1935 Cal. 153, followed.

Appeal against the order of the District Court of West Godavari at Ellore dated 27th March, 1934 and made in C. M. P. No. 903 of 1932 (S. S. No. 33 of 1932, Deputy Collector's Court, Ellore Division), and Petition under S. 115 of Act V of 1908 and S. 224 of the Government of India Act praying the

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* S. A. No. 629 of 1934 and C. R. P. No. 1536 of 1934. 18th August, 1938.

High Court to revise the decree of the District Court of West Godavari at Ellore in C. M. A. No. 17 of 1932 (M. P. No. 82 of 1932 in S. S. No. 33 of 1932, Deputy Collector's Court, Ellore Division).

P. Somasundaram for Appellant.

K. S. Desikan for Respondent.

The Court delivered the following

JUDGMENT.—The appeal and the revision petition have been heard together because they both arise out of the same litigation, but the questions raised in them are really quite different.

In the second appeal the only question is whether the lower Court was wrong in law in refusing to excuse the delay in filing the appeal. Quite clearly the lower Court was not wrong in its decision at all unless an application for copies filed on 10th August, 1932, can be regarded as an application not only for a copy of the judgment but also for a copy of the decree. The application in terms only asks for "a copy of the order" and it was not until 3rd September, 1932, that a memorandum was filed asking that the decree might be drafted and a copy of it might be granted. Now, if time had been running against the appellant until 3rd September, 1932, his appeal was time-barred. I am unable to say that the lower appellate Court committed any legal error in holding that the earlier application dated 10th August, 1932, was not an application for a copy of the decree and that there were no grounds for excusing the delay. The result therefore is that the second appeal is dismissed with costs. Leave to appeal is refused.

The Civil Revision Petition relates to an order in review of an appellate judgment restoring a suit which had been dismissed for default. The review judgment was passed by a different District Judge from the gentleman who originally allowed the appeal, but this point is not I think material for the Judge who decided the appeal in the first instance actually admitted the review application and ordered notice of it. Now, the error which was put forward as an error on the face of the record justifying interference in review was an error of law which went to the root of the jurisdiction of the District Court which heard the appeal. By S. 192 of the Madras Estates Land Act, O. 43, Civil Procedure Code, is excluded from the provisions governing procedure under the Estates Land Act. Therefore no

Venkatarayulu Naidu Bahadur v. Venkata Ratramma.

appeal lay against the order of the Deputy Collector refusing to restore the suit which had been dismissed for default. It follows that the error of the learned Judge in allowing such an appeal was one which was apparent on the face of the record to any person well acquainted with the provisions of the Act by which the appeal was governed. No research was necessary into rulings in order to discover the nature of the error.

The leading decision of this Court on the question whether an error of law can be an error apparent on the face of the record such as is contemplated in O. 47, r. 1, Civil Procedure Code, is that of *Murari Rao* v. *Balavanth Dikshit*[1], where the Bench approved of an order in review, treating as an error of law apparent on the face of the record one which was only apparent to a person acquainted with a particular ruling of this Court on a question of succession. That is to say, the case was one which was much weaker as a case for review, than the present case in which the error of law consists in overlooking a statutory provision which, if not overlooked, would have made it clear to the Court that the Court had no jurisdiction to entertain the appeal at all. Now, the correctness of the decision in *Murari Rao* v. *Balavanth Dikshit*[1] has been doubted in a judgment of Waller, J., which resulted in a reference to a Full Bench in the case of *China Venkatappayya* v. *Punnayya*[2]. The learned Judge says:

"Speaking for myself, I cannot understand how a mistake of law can be apparent on the face of the record. It may be apparent from a contrary decision of a superior Court, but that is not a part of the record"

The Full Bench which dealt with the reference found it unnecessary to decide the question whether a Judge has power to review his order on the ground of an error of law. I may remark that Krishnan Pandalai, J., who was also a member of the referring Bench along with Waller, J., took a different view from that of his learned brother. The position therefore is that the decision in *Murari Rao* v. *Balavanth Dikshit*[1] stands as an authoritative decision of a Bench of this Court If the authority of that decision is ever to be shaken, it seems to me that it will not be shaken by a decision on facts such as those now before me where it is not a question of the error being one which would be apparent only to a person who had made the necessary

1. (1923) 45 M.L.J. 309: I L.R. 46 Mad. 955.
2. (1932) 65 M.L.J. 173 (F.B.).

research into the case-law, but the error is one involving a wrongful assumption of jurisdiction and is apparent to any one who is well versed in the statute under which the appeal itself was filed. I may say that there is a decision of the Calcutta High Court, namely, *Lahiri & Co.* v. *Makhan Lal Basak*[1] to the effect that a decision which is obviously erroneous because it overlooks a clear want of jurisdiction is one which can be corrected in review. It seems to me that when there is an error of law which obviously and without research into the rulings involves a lack of jurisdiction to pass the order of which review is sought, it is eminently a case in which the error though technically an error of law, is apparent on the face of the record and should be corrected at the earliest possible time without driving the parties to the expense of an appeal or revision petition to which there would be no answer.

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The Civil Revision Petition is therefore dismissed with costs.

K. C. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE LAKSHMANA RAO.

Kottengodan Alavi .. *Appellant** (*Prisoner*).

Kotten-godan Alavi, *In re.*

Indian Penal Code (XLV of 1860), S. 326—Stabbing the left forearm of the deceased with knife—Whether amounted to murder—Grievous hurt caused—Conviction only under S 326 and not for murder.

Where the accused was sentenced to transportation for life for murder caused by his stabbing the deceased with a knife on the deceased's left forearm,

Held, that the forearm is not a vital part and the offence is not murder. It would not also be culpable homicide not amounting to murder but only grievous hurt for which the accused would only be convicted under S. 326 of the Indian Penal Code.

Appeal against the order of the Court of Session of the South Malabar in Case No. 32 of the Calendar for 1938.

The Public Prosecutor (V. L. Ethiraj) on behalf of the Crown.

The Court delivered the following

JUDGMENT.—The appellant has been convicted of the murder of his step-brother Kunhali and sentenced to transportation for life by the learned Sessions Judge of South Malabar.

There was an altercation between the appellant and Kunhali near the shop of the appellant about 10 A.M. on the 20th of

1. A.I.R. 1935 Cal 153

* Crl. Appeal No. 393 of 1938. 12th October, 1938.

Kottengodan Alavi, *In re.*

May last and Kunhali was stabbed with M.O. No. 1 the knife on the left forearm. The radial artery was pierced and Kunhali died of hæmorrhage soon after.

The appellant is alleged to have stabbed the deceased in the course of the altercation and P.Ws. 9 and 10 the disinterested witnesses not to mention P.Ws. 8 and 12 the relatives of the deceased swear to it. P.W. 13 saw the appellant pursuing the deceased with a knife in his hand and the belated story of the appellant in the Sessions Court that he was attacked by five persons including P.W. 8 and the deceased and a stab aimed at him might have caused the injury of the deceased is worthless. The witnesses were not questioned about any quarrel between the deceased, accused and others, nor is there any reason to doubt the evidence which shows that in the course of an altercation between the two, the appellant stabbed the deceased on the left forearm.

But the forearm is not a vital part and as was rightly conceded the offence is not murder. It would not also be culpable homicide not amounting to murder, and the appellant would only be guilty of voluntarily causing grievous hurt with a deadly weapon as the hurt caused was grievous and he must have known that by stabbing as he did he was likely to cause grievous hurt. The conviction for murder is therefore set aside and the appellant is convicted under S. 326 of the Indian Penal Code.

As regards sentence the altercation was not premeditated and having regard to all the circumstances the appellant is sentenced to rigorous imprisonment for three years.

K. C. —— *Conviction modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

M. Appadorai Aiyangar (deceased) and others .. *Appellants** (*Plaintiffs 2 and 3 and Nil*)

v.

P. B. Annangarachariar and others .. *Respondents* (*Defendants and 1st Plaintiff*).

Appadorai Aiyangar *v.* Annangarachariar.

Civil Procedure Code (V of 1908), S. 9 and S. 92—Suit for rules to be framed for appointment of Thodakkadar—Suit for scheme under S. 92—Jurisdiction of Civil Courts to decide question of ritual in temple

* S. A. No. 515 of 1934. 13th September, 1938.

Appadorai Aiyangar v. Annangarachariar.

A suit filed against the trustees and Adhyapakadar for a mandatory injunction asking for the appointment from time to time of the Thodakkadar for adhyapaka goshti in a temple and for that purpose to make necessary rules is a suit for framing of a scheme with regard to the Thodakkam office and is bad for want of sanction under S. 92, Civil Procedure Code.

Civil Courts in India have no ecclesiastical jurisdiction and they cannot decide questions of ritual except in so far as the decision of such questions is a necessary ingredient to the decision of civil rights. The Court will not on a mere pretence that a right to worship has been infringed, arrogate to itself a jurisdiction which it does not possess to prescribe forms of prayer, rights to religious precedence and questions of that nature.

Appeal against the decree of the Court of the Subordinate Judge of Chingleput in A. S. No. 9 of 1932 preferred against the decree of the Court of the District Munsiff of Conjeevaram in O. S. No. 235 of 1927.

V. V. Srinivasa Aiyangar, N. Srinivasa Aiyangar, K. Srinivasa Aiyangar for Appellants.

C. Narasimhachariar and *K. E. Rajagopalachariar* for Respondents.

The Court delivered the following

JUDGMENT.—This appeal arises out of the interminable and deplorable disputes between the Thengalai and Vadagalai sects of Vaishnava Brahmins worshipping in the Sri Varadarajaswami Temple at Conjeevaram. The disputes have a history going back for at least two centuries. Fortunately, we can start with the decision of this Court in *Tatacharyar* v. *Krishnamacharyar*[1], where the learned Judges set forth the ancient history of this dispute, described the Adyapakam service to which it relates and decided the main basis upon which this service shall be conducted. The learned Judges pointed out that the service consisted originally of the Thodakkam or the invocation to prayer, followed by the Mantram in praise of the Guru, after which comes the main part of the service consisting of the recitation of the Prabandams in the Tamil language. The learned Judges observed that the Thodakkam office had been by consent entrusted to a particular family of Vadagalais, that no one was at that time performing the service and that if it be true that the family to which this service was entrusted had become extinct, the united sects should elect a common representative to the office of Thodakkadar, which office, it was held, had become severed from the main Adyapakam services, so that any right of

1. (1882) I.L.R. 5 Mad. 313.

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the Thengalais as mirasdars to hold that office had been lost. Except the Thodakkam office it was declared that the Adyapakam miras belonged exclusively to the Thengalais residing at Conjeevaram who were entitled to discharge the duties of the office both inside the temple and in processions outside the temple, the Vadagalais being restrained from interfering with the Thengalais in the recital of the Mantram and Prabandams otherwise than as ordinary worshippers. This judgment delivered in 1882 was followed by a litigation which started in O. S. No. 10 of 1906 on the file of the District Court of Chingleput. In that suit the Thengalais prayed for a declaration that the Vadagalais had no right to recite any Mantram, Prabandam or Vazhi Thirunamam, in other words, to take part in the Adyapakam service, except as ordinary worshippers. They asked for a declaration that the right of the Vadagalais as worshippers was only to recite the same Mantram, Prabandam and Vazhi Thirunamam as the Thengalais and that in so doing they should station themselves behind the Thengalais as part of the assembly of the Thengalai mirasdars. They also prayed for the consequential injunction. It has to be noted that the hymn called Vazhi Thirunamam which is introduced into this plaint was not expressly covered by the judgment in *Tatacharyar v. Krishnamacharyar*1. Vazhi Thirunamam is apparently a supplemental hymn sung at the conclusion of the Prabandams and it is not sung in a form common to the two sects as the Prabandams are. One of the questions in issue in the 1906 suit was:—

"What is the proper Patram and appropriate Vazhi Thirunamam to be used at the time of the Adyapakam service and whether the plaintiffs had the right to recite Vazhi Thirunamam."

The learned District Judge observes in paragraph 7 that the Adyapakam service consists mainly in the recitation of the Prabandam preceded by the recitation of the Mantram or hymn, and followed by the recitation of a stanza in honour of the saint who was invoked by the hymn chanted at the beginning. That is to say it is recognised that the Vazhi Thirunamam is the appropriate conclusion of the Adyapakam service and that the stanza recited must be in honour of the saint invoked in the Mantram which begins the service. In dealing with the issues the learned District Judge lumps together various issues relating to the precise form of the service and the rights of the parties

1. (1882) I.L.R. 5 Mad. 313.

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and holds that the Thengalais are entitled to protection in the conduct of their office at the actual times of service during the Puja and in processions, that the Vadagalais as ordinary worshippers may, if they choose, join the Thengalais in the service of Adyapakam and if they do so, they must recite the same Mantram and Prabandam. He observes:—

"The plaintiffs ask that it should be declared that the Vadagalais have no right to recite any Mantram or Prabandam or Vazhi Thirunamam, in other words, to take part in the Adyapakam service except as ordinary worshippers The rights of the defendants were declared in *Tatacharyar* v. *Krishnamacharyar*[1] and the plaintiffs have already got a declaration to this effect."

Reading these portions of the judgment together, it seems to me that the only possible conclusion is that the learned District Judge decided that the whole of the Adyapakam service was to be performed by the Thengalai mirasdars, that the Vazhi Thirunamam was treated as part of the Adyapakam service and that from the omission to refer to it specifically in the decree which resulted it cannot be inferred that the District Judge negatived the claim of the Thengalai mirasdars to recite the Vazhi Thirunamam as part of the Adyapakam service.

This judgment of the District Judge, Chingleput, was considered in appeal. The appellate judgment is reported in *Thiruvengadachariar* v. *Krishnaswami Thathachariar*[2]. The High Court substantially confirmed the District Judge's decree and held that only one Mantram may be recited, namely, that of the Thengalai mirasdars, that the recital of a different Mantram or Prabandam during any ceremonial worship or by any ghoshti would be an interference with the duties of the office and that any interference in the Puja from its commencement with the ringing of the bells to its close with the distribution of Theertham and Prasadam is a violation of the plaintiff's mirasi rights. There is no specific reference in the judgment to the Vazhi Thirunamam and the decree as modified by the High Court runs as follows:—

"That it is only the Thengalai Mantram of Sri Sailesa Daya Patram that may be recited within the temple during any ceremonial worship or by any Ghoshti and that Vadagalais are only entitled to join the Thengalai Adyapakam Ghoshti as worshippers by reciting the same portion of the Prabandam that is being recited by the Adyapaka mirasdars; that the defendants the Vadagalais be restrained from reciting their own mantrams and Prabandams

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1. (1882) I.L.R 5 Mad. 313   2 (1915) M.W.N. 281.

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during the Puja period, that is, from the commencement of the Puja to the close thereof by the distribution of the Thirtham and Prasadam, etc."

This decree though it does not in so many words prescribe the singing of the Thengalai Vazhi Thirunamam by the mirasdars does very clearly prescribe the conduct of the whole Adyapakam service right up to its termination by those mirasdars. It restrains the Vadagalais from singing their own sectarian hymns and chants or taking any part except by joining the Ghoshti as worshippers and reciting the Prabandams recited by the mirasdars.

Having in view the contentions of the parties and the findings of the District Judge and the wording of the decree, I have no doubt that the intention of the learned Judges was to authorise the mirasdars to append to the service its customary conclusion in the form approved by the sect to which they belonged, whose cult was to govern the service. After this decree the Vadagalais appeared to have tried on the strength of the declaration of their right to "join" the Ghoshti to establish a right to stand in the front rows of the Ghoshti or congregation amongst the actual mirasdars responsible for the service. This claim was resisted and there followed a series of temporary magisterial orders passed in the interests of peace, whereby the Vadagalai worshippers were prevented from standing in the two front rows of the Ghoshti in services or processions. One of the objects of the present litigation is to establish that the Vadagalais have the right to stand where they like in the Ghoshti during the services in the temple and in processions through the streets.

The plaint prays for a confused collection of reliefs. Firstly, it asks for a mandatory injunction asking for the appointment from time to time of the Thodakkadar and for that purpose framing the necessary rules. This relief does not state upon whom the injunction is to operate. The defendants include not only the representatives of the Thengalai mirasdars, but also the Vadagalai trustees of the temple and representatives of the Thathachariar family in whom the Thodakkam office is said once upon a time to have vested. The prayer for framing the necessary rules carefully avoids the use of the word "scheme", but in effect this prayer is nothing more than a prayer for framing a scheme for the reconstitution of an obsolete temple office. To my mind such a prayer is bad for

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want of the Advocate-General's fiat under S. 92 of the Civil Procedure Code.

The second prayer is for a decree

"determining and declaring the occasion, time and place, the manner and the conditions relating to the performance of the Adyapakam service by both the Thengalai mirasdars and the Vadagalais and granting a permanent injunction restraining the Thengalais from interfering with the exercise by the plaintiffs of their rights relating to the Adyapakam services by joining with the Thengalais equally in all rows of the Ghoshti both inside and outside the temple either by force or physical exclusion or by reciting texts other than those detailed in the Schedules A and B hereunder or by any other Act, word or deed or in any other manner whatsoever."

This strange conglomeration of reliefs could only be made completely effective by the drafting of a most elaborate manual of ritual with detailed rubrics and forms of prayer. I will discuss later my reasons for holding that no civil suit lies for the reliefs prayed for under this head.

Thirdly, the Vadagalai plaintiffs pray for a decree directing the defendants 1 to 4 to pay the plaintiffs individually or as representing the entire Vadagalai community a sum of Rs. 50 as and by way of damages. This prayer is clearly nothing more than an attempt to give the colour of a civil claim to the subject-matter of the suit which is in danger of being rejected as not being of a civil nature. No attempt has been made before me to argue that this claim for damages has any substance.

Before dealing with the prayer for detailed specifications of the ritual connected with the service and the rights of the worshippers, it is desirable to set forth briefly the principles which govern such suits and to consider whether a suit pertaining to ritual is one within the cognisance of the Civil Courts. It is, I think, unquestionable that the Civil Courts in India have no ecclesiastical jurisdiction and that they cannot decide questions of ritual except in so far as the decision of such questions is a necessary incident to the decision of civil rights. It is well established that a right to worship in a particular temple is a civil right and that a right to perform a religious office to which obligations and emoluments are attached is also a civil right. It has been recognised that the Court in adjudicating on a right of worship or a right to a religious office not infrequently is obliged to decide incidentally questions of ritual but it follows that the Court will not on a mere pretence that a right to

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worship has been infringed, arrogate to itself a jurisdiction which it does not possess to prescribe forms of prayer, rights to religious precedence and questions of that nature.

The right of the plaintiffs appellants to take part in the Adyapakam worship has been not only recognised but defined. The right of the defendants mirasdars to conduct the Adyapakam service has also been established by judicial decisions. I am of opinion that the decrees of the High Court in the two cases quoted have settled, with such definition as is necessarily incidental to the establishment of the civil rights both of the mirasdars and of the ordinary worshippers, the ritual which it is the duty of the office-holders to observe. The plaintiffs ask this Court to go further than this and prescribe a complete set of rubrics which shall establish precisely the prayers to be used, the positions to be occupied by the various classes of worshippers, the time when the service is to begin and cease, and the precise manner in which it is to be conducted. In answer to this prayer I would only observe that the Civil Courts have neither the power nor the duty to attempt to draft a prayer-book for this temple.

I have already indicated that to my mind the plaintiffs are in error in assuming that the decision in the 1906 suit negatived the right of the Thengalai mirasdars to recite their own Vazhi Thirunamam at the conclusion of the service. The right of the Vadagalais to join the service as worshippers has been established and is not contested. To recognise any right on their part to stand in the front row of the congregation would be not only to afford to them facilities for impeding the performance of the Adyapakam service by the mirasdars who have the right and the duty to lead it, but would in effect be to lay down as a matter of right a rule of precedence in worship which the plaintiffs are under no obligation to perform and in which it has been established that they have no more than a right to join as members of the general body of worshippers frequenting the temple. Owing to the factions between the parties, the Magistrates have found it necessary to issue temporary orders prohibiting the Vadagalais from stationing themselves in the positions where their presence was deemed likely to lead to a breach of the peace. Those orders are justified by the paramount necessity to prevent disturbances. A Civil Court cannot, in my opinion, be required to declare the right of the plaintiffs to stand in any

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particular row of the congregation. Obviously, the mirasdars who have the duty to lead the service must be protected in the exercise of their duty. It has been recognised that the plaintiffs have the right to join in the service as ordinary worshippers without interfering in the conduct of the service by the mirasdars. It is an obvious exaggeration to suggest that the recital of prayers which are customary but peculiar to the officiating sect amounts to an obstruction of the plaintiffs' right of worship. To assert that the plaintiffs have been debarred from worship by reason of their alleged exclusion from the first two rows is also to ignore the obvious facts. I am of opinion that there has been no interference with the civil right of the plaintiffs to worship in the temple, that the right of the mirasdars to conduct the Adyapakam service has been sufficiently delimited by the previous judgments and that the Civil Court has no jurisdiction to prescribe the modes of worship, prayers and religious precedence where no question of civil rights really arises.

In this view, it is unnecessary to go into the question of limitation on which the lower Courts found against the plaintiffs, but I would observe that it is difficult to hold that the exclusion of one or two individual worshippers from a particular position could have the effect of barring the right of the whole community to which those individuals belong to worship in that position if the right claimed were a civil right, such as could be established in the Civil Courts.

In the result, the appeal is dismissed with the costs of the contesting respondents 1 to 4.

Leave to appeal refused.

S. V. V. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE LAKSHMANA RAO.

The Public Prosecutor .. *Appellant**

v.

Natesa Pillai .. *Respondent (1st Accused).*

Public Prosecutor v. Natesa Pillai.

Emigration Act (VII of 1922), Ss. 2, 16, 25 (2) (b)—Workmen trying to leave British India by ship for work elsewhere without Local Government's permission—Assistance by proprietor of a firm in their attempt—Offence against the Act—Person who helped them to leave the place guilty of offence—Conviction whether proper.

* Crl. Appeal No. 328 of 1938. 9th December, 1938.

Public Prosecutor v. Natesa Pillai.

Where the proprietor of a Cigar Manufacturing Company in British India supported the emigration out of British India of some skilled workmen with the purpose of their being employed by his own concern outside British India in a place called Klang, and since the requirements of S. 16 of the Emigration Act were not complied with, the workmen were suspected and detained, and a prosecution was sanctioned under S. 25 (2) (*b*) of the Emigration Act against the proprietor for having helped them to emigrate, but he raised the defence that he was not responsible for any help given to them and that even otherwise they were emigrants as defined under S. 2 (1) (*b*) of the Act,

Held, (1) that an agreement to work for hire was not necessary for an offence under S. 25 (2) (*b*) of the Act and it was unnecessary to consider whether as found by the lower Court the workmen ought to have been engaged by the proprietor in his own concern at a place outside British India;

(2) that since the permission of the Local Government for skilled workmen to emigrate was not obtained as required by S. 16 of the Act, the proprietor should be convicted in so far as the material S. 25 (2) (*b*) provides, that whoever assists or attempts to assist any person to emigrate or attempts to emigrate or to leave any place for the purpose of emigrating, shall be punishable with fine.

Appeal under S. 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid respondent (1st accused) by the Court of Sessions of the East Tanjore Division in C. A. No. 5 of 1938 on his file, preferred against the judgment of the Court of the Sub-Divisional Magistrate of Negapatam in C. C. No. 163 of 1937.

The Public Prosecutor for Appellant.

Nugent Grant and *N. Ramaswami Aiyar* for Respondent (1st Accused).

The Court delivered the following

JUDGMENT.—This is an appeal by the Provincial Government against the acquittal of the respondent of an offence under S. 25, cl. (2) (*b*) of the Emigration Act.

The respondent is the proprietor of M. S. Natesa Pillai Company, Cigar Manufacturers, Trichinopoly and the undisputed facts are that on 2nd July, 1937, ten persons described as cigar workmen went to P. W. 4, the clerk of the forwarding agents of Natesa Pillai Company at Negapatam with Ex. C the letter written under the orders of the respondent requesting the forwarding agents to make the workers start comfortably to Klang to which they were bound. It appears from the letter that a sum of Rs. 250 had been sent to the forwarding agents the previous day though it is also mentioned that the workmen were bringing with them money for their steamer fare and expenses, and P. W. 4 arranged with the deck passenger broker for tickets. The requirements of S. 16 of the Emigration Act

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were not complied with and the workmen were detected and questioned at the wharf. It transpired that they were assisted by the forwarding agents at the request of the respondent and Ex. C the letter came to light. The respondent had infringed the provisions of the Act previously and by Ex. D the memorandum, an explanation was demanded from him. Ex. D-1 the reply was received and it was alleged that the workmen requested the respondent to send them to his shop at Klang. They were told that hands were not needed but they persisted saying that they would go at their own expense and work in his shop if work was found or in other shops, and begged him to write to his agents to help them to secure tickets. So he wrote Ex. C the letter to the forwarding agents and they arranged for the tickets.

The prosecution of the respondent under S. 25, cl. (2) (*b*) of the Emigration Act was sanctioned in due course by the Protector of Emigrants, and the case was restricted during the trial to three of the workmen, namely, Periyanayagam, Paramasivan and Manickam. The respondent pleaded that Ex. C was written by his manager without his consent or knowledge, and denied having assisted or attempted to assist the workmen to emigrate. He pleaded further that those workmen were emigrants as defined in S. 2, cl. (1) (*b*) of the Emigration Act and Periyanayagam as his sole witness supported him. But the defence case was disbelieved by the Sub-Divisional Magistrate and the respondent was sentenced under S. 25, cl. (2) (*b*) of the Act to pay a fine of Rs. 100 with simple imprisonment for three months in default. An appeal was taken to the Sessions Judge, and he too disbelieved the case of the respondent that the workmen were emigrants as defined in S. 2, cl. (1) (*b*) of the Act and that Ex. C was not written at his instance. The Sessions Judge further held that the workmen wanted to depart by sea out of British India for the purpose of and with the intention of working for the respondent but acquitted him because there was no evidence of an agreement between the parties and the respondent cannot consequently be said to have assisted them to emigrate contrary to the provisions of the Emigration Act.

The case of the respondent that the particular workmen were emigrants as defined in S. 2, cl. (1) (*b*) of the Emigration Act was rightly disbelieved, and it is beyond dispute that

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they are skilled workers as defined in the Act. The permission of the local Government for assisting skilled workers to emigrate was not obtained as required by S. 16 of the Act and so far as is material S. 25, cl. (2) (*b*) provides that whoever except in conformity with the provisions of the Act assists or attempts to assist any person to emigrate or attempt to emigrate or to leave any place for the purpose of emigrating shall be punishable with fine which may extend to five hundred rupees. That there was an attempt to emigrate in this case cannot be disputed and it is obvious that the respondent attempted or assisted those workers to attempt to emigrate to Klang. The workers are not related to him and they wanted to go to Klang for working for hire. An agreement to work for hire is not necessary, for an offence under S. 25, cl. (2) (*b*) of the Act and it is unnecessary to consider whether as found by the Sub-Divisional Magistrate the workers must have been engaged by the respondent to work in his shop at Klang. The guilt of the respondent under S. 25, cl. (2) (*b*) admits of no doubt and the order of acquittal cannot be sustained. It is therefore set aside and the order of the Sub-Divisional Magistrate convicting the respondent under S. 25, cl. (2) (*b*) and sentencing him to pay a fine of Rs. 100 with simple imprisonment for three months in default is restored.

K. C. ——— *Acquittal set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VARADACHARIAR AND MR. JUSTICE PANDRANG ROW.

The Board of Commissioners for the Hindu Religious Endowments, Madras .. *Appellant* (1st Defendant)*

v.

Pidugu Narasimham and others .. *Respondents (Plaintiff and Defendants 3 and 4).*

Board of Commissioners for the H. R. E., Madras v. Pidugu Narasimham.

Madras Hindu Religious Endowments Act (II of 1927), S. 9 (12)—Temple—Institution connected with historic event—Public worship carried therein—Distribution of offerings—Worshippers having belief in religious efficacy of worship—Nature of institution—Religious worship—Test of.

Where an institution was originally connected with an historic event of the 13th century and later developed into a place of worship and it was found

*Appeal No. 276 of 1933. 15th February, 1938.

that Nitya Naivedya Deeparathana was performed, animal sacrifices were offered and the offerings were distributed and the public who took part in the worship believed in its religious efficacy,

Held, that the worship was religious and the institution a temple within the meaning of S. 9 (12) of the Madras Hindu Religious Endowments Act.

The test of 'religious worship' is not whether it conforms to any particular school of Agama Sastras but whether the worshippers, by such worship, are making themselves the object of bounty of some super-human power.

Board of Commissioners for the H. R. E., Madras *v.* Pidugu Narasimham.

Appeal against the decree of the District Court of Guntur in O. S. No. 43 of 1928.

P. V. Rajamannar for Appellant.

S. Venugopala Rao for Respondents.

The judgment of the Court was delivered by

Varadachariar, J.

Varadachariar, J.—This is an appeal by the Madras Hindu Religious Endowments Board against a decree setting aside a scheme framed by the Board for the administration of an institution known as "Sri Virlu Alaya" in Karampudi village, within the jurisdiction of the Guruzala District Munsif's Court. The Board framed a scheme on the footing that the institution was a "temple" within the meaning of the Madras Hindu Religious Endowments Act. The plaintiff, who sometimes called himself the Dharmakartha of the institution, instituted the suit for a declaration that the institution, was not a temple within the meaning of the Act and that therefore the Board had no jurisdiction to frame a scheme in respect of its administration. The learned District Judge held that the worship carried on in the place was merely hero-worship and not religious worship and that the institution was not therefore a "temple" within the meaning of the Act. Hence this appeal.

Though the parties have differed as to the significance of certain events described in the course of the evidence and as to the description of certain parts of the structure of the building wherein the objects of the worship are located, there is very little dispute as to the nature of the structure or the kind of celebration in the institution. A Commissioner was appointed to prepare a plan of the place and submit a report; and the oral evidence gives a fairly detailed account of the kind of worship and of the festivals that take place there. It appears that there are substantial structures similar to "Mantapams" and that in one of these, there are 66 stones placed along the three walls and these are called Viranayakulu or Virlu Vigrahalu. As

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Varadachariar, J.

regards the building, the learned District Judge himself was of opinion that the structures were generally consistent with the institution being a temple; but he thought that they were equally consistent with its being a kind of memorial. The latter alternative arises out of the history of the institution.

It is obvious that the institution has been in existence for several centuries and has been the recipient of Inam grants even during the Mogul period. It is in some way connected with an historical event of the 13th century relating to a war between two neighbouring Kingdoms of the locality in which the 66 heroes are said to have been killed. But whatever the origin of the institution may be, it is clear that in course of time, at least before the Inam grants came to be made to them, it had developed into a place of worship, because we find from the Inam papers that Inams have been granted for the performance of Nitya Naivedya Deeparadhana in the institution and for Poojaries and for Bajantris who are expected to do service in connection therewith. In the course of the oral evidence, it has been suggested that Nitya Naivedya Deeparadhana is not performed all through the year but only either on twenty days in the year or on five days in the year. We do not think that this limitation of the number of occasions, even if true, alters the character of the institution. On the other hand, it is of considerable significance that the worship should have become sufficiently important to attract public endowments thereto.

The description given in the oral evidence of five days' celebration in connection with this institution is no doubt to a great extent reminiscent of the War in which the heroes are said to have taken part. But we are unable to agree with the conclusion of the learned District Judge and with the arguments of the learned Counsel for the respondent before us here, that the celebration is nothing more than a commemoration of that historical event. It may be difficult to mark the dividing line between a mere commemoration of the event and a celebration of worship, in the case of heroes who are said to have lived several centuries ago but have continued all along to be the subject of public homage. The performance of Nitya Naivedya Deeparadhana, the offering of animal sacrifices and the distribution of those offerings amongst the assembled audience certainly carry the celebration beyond the limits of a mere

commemoration. The evidence adduced on the plaintiff's side shows that the rice which is distributed at the end of the ceremony amongst the people present is carried home by them and scattered in their fields; obviously in the belief that it will make the fields more productive. One of the witnesses also says that the shrubs and thorns into which those who for the time being act the part of the heroes throw themselves are taken in pieces by the audience to their houses and fields as being auspicious.

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The Hindu Religious Endowments Act, no doubt, speaks of a temple as a place of "public religious worship". That what the evidence in this case describes as taking place in connection with the institution is public worship can admit of no doubt. We think it is also religious. The test is not whether it conforms to any particular school of Agama Sastras; we think that the question must be decided with reference to the view of the class of people who take part in the worship. If they believe in its religious efficacy, in the sense that by such worship, they are making themselves the object of the bounty of some superhuman power, it must be regarded as "religious worship".

In this view, the learned District Judge was not justified in holding that the appellant Board had no power under the Act to frame the scheme. The appeal must be allowed with costs here and in the Court below—costs to be paid by the first respondent.

K.C. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING.

Kocherlakota Gopala Rao .. *Appellant* (Petitioner)*

v.

Kopparaju Lakshminarasamma .. *Respondent (Respondent).*

Gopala Rao *v.* Lakshminarasamma.

Decree—Award of—Two defendants sued against on two debts by two creditors—Third defendant decreed against so far costs were concerned—Rateable distribution—Payment by third defendant into Court and application for record of satisfaction—Objection by decree-holder—Third defendant entitled to claim his liability discharged in the circumstances of the case.

Where a decree awarded the decree-holder a certain sum payable by first and second defendants and also a further sum by way of costs payable by not only the first and second defendants but also by the third defendant and the

* A.A.A.O. No. 135 of 1935. 20th October, 1938.

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decree was executed, and in his own execution and in another creditor's petition against defendants 1 and 2 he had received a certain sum amounting to about a half of the total decree amount by way of rateable distribution and subsequently the third defendant having paid Rs. 100 to the decree-holder filed a petition to Court to record full satisfaction so far as he was concerned with regard to the portion of the decree, namely, costs,

Held, it would be unfair and clearly inequitable for the decree-holder to claim after recovery of the money that it should all go towards the satisfaction of the first of these two debts. The result would be that he had received for the first debt more than what was due to him under the provision of the rule dealing with rateable distribution and less on the second debt.

Bardwell v. *Lydall*, (1831) 7 Bing. 489: 131 E.R. 189, applied.

The appellant was entitled to succeed in his contention that he had fully satisfied his liability under the decree upon an actual calculation made.

Appeal against the order of the Court of the Subordinate Judge of Bezwada dated the 27th day of March, 1935, and made in A. S. No. 5 of 1935 preferred against the order of the Court of the District Munsiff of Bezwada dated 24th November, 1934 and made in C. M. P. No. 1830 of 1934 in O. S. No. 326 of 1929.

B. V. Ramanarasu for Appellant.

Respondent not represented.

The Court delivered the following

JUDGMENT.—This appeal raises an interesting point with regard to the effect of rateable distribution of assets upon the amounts payable to the decree-holder under the decree in O. S. No. 326 of 1929. That decree awards the decree-holder a certain sum payable by the first and second defendants and also a further sum by way of costs payable by not only the first and second defendants but by the third defendant also. The decree was executed by the decree-holder and in his own execution petition and in another execution petition by another creditor of defendants 1 and 2 he received a certain sum amounting roughly to about one half of the total decree amount by way of rateable distribution. Subsequently to the receipt of this money the third defendant has admittedly paid Rs. 100 to the decree-holder. In 1934 the third defendant filed a petition in the Court of the District Munsiff of Bezwada praying that full satisfaction might be entered in his favour with regard to that portion of the decree for which he was liable, namely, costs. Both the learned District Munsiff and the learned Subordinate Judge of Bezwada have dismissed this petition. Hence this appeal.

I have not had the advantage of hearing any arguments on behalf of the respondent. But it seems to me quite clear from the principles contained in the English cases cited by the learned Counsel for the appellant that these decisions of the Courts below are wrong. The right of the decree-holder to receive the money which he received in the rateable distribution was derived from the fact that there was payable to him a total sum in respect of what may fairly be called two debts due by his judgment-debtors. For both these debts the defendants 1 and 2 were liable and for that relating to costs the third defendant also. The decree-holder opposes the third defendant's application to record full satisfaction and argued that he had a right to appropriate this money to any portion of the decree which he liked; and at first sight it does appear as if such a right may reasonably be claimed inasmuch as the money was realised by the sale of property which was the property of the first and second defendants alone. The fact however still remains that it was because of the *total* of the *two* debts that the respondent was able to get as much as he did get by way of rateable distribution. It will then be clearly inequitable and unfair for him to claim after receiving the money that it must all go towards the satisfaction of the first of these two debts. The result would then be that he had received for the first debt more than was due to him under the provisions of the rule dealing with rateable distribution and less on the second debt.

The case which is the foundation for the argument of the learned Counsel for the appellant is *Bardwell* v. *Lydall*[1], decided more than a century ago in the English Courts. That was a case in which a guarantee has been given by the defendant to the plaintiffs to be responsible for the debts to a certain Lionel Mayhew to the extent of £400. Mayhew's debts to the plaintiffs amounted eventually to £625 and he became virtually insolvent and entrusted his properties to trustees for payment of his creditors. The trustees paid the plaintiffs 8*s*. 7*d*. in the pound on this sum of £625. They then sued the defendant on his guarantee for the remainder of that debt, which amounted to less than £400. It was held by the Court that the 8*s*. 7*d*. in the pound which had been received was 8*s*. 7*d*. in every pound of the £625 which constituted the debt, and therefore

1. (1831) 7 Bing. 489: 131 E. R. 189.

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to the extent of 8*s*. 7*d*. every pound of the £400 which had been guaranteed by the defendant had already been paid off. The liability therefore under the guarantee amounted only to the remaining 11*s*. 5*d*. in the pound. I have carefully considered this case, which has been followed in subsequent cases in England, and consider that it must apply in principle to the facts of the present case. The decree-holder here, it is clear, cannot appropriate the sum he receives by way of rateable distribution in any way he likes. He must admit that what he has received goes towards the payment of every rupee of his debt if it be regarded as a single debt, or equally towards the payment of both the debts contained in the decree if they are regarded as two debts.

It is clear from the calculations made by the learned Subordinate Judge that if this point of law is to be accepted, the appellant is entitled to a credit for the sum of Rs. 89-15-0. It has already been said that he has paid Rs. 100. The total amount of Rs. 189-15-0 is more than the amount of costs with interest due at the time of the payment under the rateable distribution. Therefore the appellant is entitled to succeed in his contention that he has fully satisfied his liability under the decree. In the result this appeal must be allowed and the appellant's petition ordered with costs throughout.

K. C. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Appellate Jurisdiction.]

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE MADHAVAN NAIR.

C. Venkatarangam Naidu .. *Appellant** (*Defendant*)

v.

B. Jagannadha Dass and another .. *Respondents* (*Plaintiffs*).

Venkatarangam Naidu v. Jagannadha Dass.

Original Side Rules, O. VII—Suit for moneys based on an account as well as on a promissory note—Leave to defend granted conditionally on furnishing of security—Whether conditional leave was proper in the circumstances and nature of the claim.

Where an association based their claim for moneys against the present appellant on two grounds, namely, (1) that he would be liable for the amount on taking of an account, and (2) that the appellant had signed a promissory

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* O. S. A. No. 51 of 1938. 20th October, 1938.

note in respect of the moneys he had received from the association, and the suit was filed under O. VII of the Original Side Rules, whereupon the appellant applied for leave to defend as required by the Rules which was granted by the lower Court conditionally on his furnishing security to the Court,

Venkata-rangam Naidu *v.* Jagannadha Dass.

Held, that the appellant was entitled to defend the suit without security being required of him as in the first place the claim on the account had not been withdrawn and secondly that a substantial question of law was involved in the plea that the claim could not be granted as one having been against public policy as mentioned in S. 23 of the Contract Act.

Appeal against the order of the Hon'ble Mr. Justice Gentle dated 10th May, 1938, and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Application No. 684 of 1938 in Application No. 246 of 1938 in C.S. No. 241 of 1937.

K. Krishnaswami Aiyangar for *V. S. Rangachari* for Appellant.

V. Radhakrishnayya for Respondents.

The judgment of the Court was delivered by

Leach, C J.

The Chief Justice.—This is an appeal against an order requiring the appellant to furnish security before being allowed to defend a suit instituted on the Original Side of this Court by the respondents. The respondents are the secretary and treasurer of an association known as the Madras Mahajana Sabha. In 1931 and 1932 the appellant was the treasurer and also a trustee of the association. The suit has been filed to recover Rs. 7,074 from the appellant, and the respondent base their claim on two grounds. In the first place they say that the appellant will be found liable for this amount on the taking of an account of the monies he received when holding the office of treasurer. In the second place they sue on a promissory note for Rs. 6,000 which the appellant signed on the 20th December, 1934, in respect of monies he had received.

The suit was filed under O. VII of the Original Side Rules. This order contemplates a suit to recover a debt or to liquidate a demand in money payable by the defendant with or without interest arising upon a contract expressed or implied; or on a bond or contract for payment of a liquidated amount of money, or on a guarantee where the claim against the principle is in respect of a debt or liquidated amount. In a suit filed under this order leave to appear and defend must be obtained. The leave may be given unconditionally or subject to terms. So far as this suit is based on the promissory note it is within this

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order, but the amount is also claimed on the basis of an account, and a suit for an account does not come within the order.

The appellant applied for leave to defend and according to the Master's order advanced the following pleas:—(1) the promissory note was executed under duress; (2) it is devoid of consideration; (3) the consideration is against public policy as coming under S. 23 of the Indian Contract Act as stifling a criminal prosecution; and (4) there is no stipulation for interest and therefore the claim for interest is untenable. The master came to the conclusion that the defences were not of a *bona fide* nature and granted the appellant leave to defend only on condition that he furnished security for the full amount of the claim. An appeal from this order was heard by Gentle, J., who saw no reason to interfere and therefore confirmed it. It appears that the Madras Mahajana Sabha has been declared an unlawful association and when the matter was before the learned Judge the appellant wished to raise a defence based on this fact, but the learned Judge refused to allow it as there was no evidence on the record to support it.

Without going into all the matters which have been mentioned by the learned Advocate for the appellant in the course of his argument it appears to us that the appellant is entitled to defend this suit without security being required of him In the first place the claim on the account has not been withdrawn, and the learned Advocate for the respondents had made it quite clear that the claim for an account will be persisted in. In the second place there does appear to be a substantial question of law involved in the plea that the claim cannot be granted as being one against public policy. For these reasons we set aside the order requiring security to be furnished and grant the appellant unconditional leave to defend. We direct that the costs of this appeal shall be costs in the cause.

The learned Advocate for the respondents asks us to direct that the hearing of the suit be expedited. This is a matter which concerns the Original Side and the application must be made there.

K. C. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VARADACHARIAR AND MR. JUSTICE ABDUR RAHMAN.

The Palghat Coimbatore Transport Co., Ltd., by its Liquidator N. Krishnaswami Naidu .. *Appellant** (*1st Defendant*)

v.

Narayanan and others .. *Respondents* (*Plaintiff and 2nd Defendant*).

Palghat Coimbatore Transport Co., Ltd. *v.* Narayanan.

Tort—Accident by collision of two buses—Injury to and death of a passenger—Claim by representatives under Fatal Accidents Act—Both drivers found guilty of negligence—Joint decree against owners of buses—If proper—Liability if joint—Drivers, if joint tort-feasors.

While driving in a road 26 feet wide two buses coming in opposite directions collided in the middle of the road and it was found that it was a result of the drivers of the two buses persisting in driving on the metalled portion of the road each declining to make room for the other to pass by. One *V*, a passenger in one of the buses, died as a result of the collision. The representatives of *V* filed a suit under the Fatal Accidents Act for damages for loss of the life of *V* impleading the owners of both the buses as defendants and the trial Court gave a joint decree against both the defendants,

Held, that as both the drivers persisted in driving without making room for the other to pass by, both the defendants must be held liable.

Mills v. *Armstrong*, (1888) 13 A.C. 1, relied on.

Even assuming that the present case is not a case of a joint tort, yet it will not necessarily follow therefrom that the damages should or could be assessed separately as against each of the defendants. The case will fall in the category of cases of injury arising from "composite negligence". In such a case, the plaintiff is not bound to a strict analysis of the proximate or immediate cause of the event to find out whom he can sue. Subject to the rules as to remoteness of damage the plaintiff is entitled to sue all or any of the negligent persons and it is no concern of his whether there is any duty of contribution or indemnity as between those persons, though in any case he cannot recover on the whole more than his whole damage.

In re *Wingfields*, (1923) 2 K.B. 112, applied.

Croston v. *Vaughan*, (1938) 1 K.B. 540 and *Piper* v. *Winnifrith and Leppard*, (1917) 34 T.L.R. 108, distinguished.

Appeal against the decree of the Court of the Principal Subordinate Judge of Coimbatore in O. S. No. 97 of 1931.

K. Rajah Aiyar and *P. Rangachari* for Appellant.

K. V. Ramaseshan for Respondents.

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*Appeal No. 151 of 1934. 5th October, 1938.

Palghat Coimbatore Transport Co., Ltd. v. Narayanan.

Varadachariar, J.

The judgment of the Court was delivered by

Varadachariar, J.—This appeal arises out of a suit instituted under the Fatal Accidents Act by the representatives of one Venkatarama Aiyar who died in February, 1930, as the result of a collision between two motor buses in one of which the deceased was travelling. The owners of the two buses have been impleaded as defendants 1 and 2 and they may be referred to as the U.M.S. Motor Service and the I.M.S. Motor Service respectively. It is in one of the buses run by the U.M.S. Service that the deceased was travelling at the time of the accident. The I.M.S. Service bus was coming in the opposite direction, and at a point where the road is found to have measured 26 feet in breadth, there was a collision between the two buses almost in the middle of the road. The lower Court gave the plaintiffs a joint decree against both the defendants for sums aggregating to Rs. 10,000. Against that decree, the first defendant has preferred this appeal.

The first point urged in support of the appeal is that the driver of the U.M.S. bus was not negligent or reckless and that the appellant should not therefore be held liable. There has been some controversy as to the exact part of the road where the collision took place. The witnesses examined on behalf of the first defendant, U.M.S. Service, suggest that at the time of the accident the U.M.S. bus was very near the extreme left edge of the road which will be its proper side and was within one or two feet of a ditch which adjoined the road on that side. The evidence of some of the lay witnesses does not appear to us quite reliable; assuming they were in the bus, it is doubtful if they took note of such matters. It is the driver of the bus who puts the distance between the bus and the ditch at 2 feet while the lay witnesses would swear that it was one foot. The Police Officer who was on the spot very soon after the incident expressed his opinion that the collision must have taken place in the middle of the road. He was no doubt not present at the spot at the time when the accident occurred; but we think that the lower Court was right in accepting his inference as correct because he stated that the brain matter of one of the passengers who was killed in the accident was found right in the middle of the road when he went to the spot and it was hardly likely that this matter could have changed its position from the spot where it actually fell at the time of the accident. It appears from the

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evidence that only 12 feet of the road width about the middle is metalled and there is a margin of 8 feet on the one side and 6 feet on the other unmetalled. We see no reason to differ from the conclusion of the learned Trial Judge that the unfortunate accident must have happened as a result of the drivers of the two buses persisting in driving on the metalled portion each declining to make room for the other to pass by. In this view both the defendants must be held liable. (*Mills* v. *Armstrong*[1].)

As regards the quantum of damages, Mr. Rajah Aiyar, the learned Counsel for the appellant-first defendant, complained that the amount of Rs. 10,000 awarded by the lower Court was excessive and not warranted by the financial position of the deceased. It must be said in justification of this argument that the evidence bearing on the quantum of damages is some what vague and the plaintiffs could have produced more satisfactory evidence. But, such as it is, the evidence has been accepted by the learned Subordinate Judge as substantially reliable. Assessment of damages in a case of this kind must necessarily be only rough and approximate and we are not prepared to say that the amount awarded by the lower Court is so excessive that it can be described as arbitrary or whimsical. Nor are we in a position to say that a lower figure will necessarily be the correct figure. The evidence shows that the deceased was aged only 40 at the time of his death, that he had a family of 7 members to support and that he was managing to maintain that family in a certain decent standard of living. It is true that in a case of this kind the assessment of damages should not be made merely with reference to the plaintiff's requirements, but as the evidence establishes that the plaintiff's requirements were being fairly met by the deceased, the learned Judge was in our opinion justified in proceeding to assess damages on that basis.

The third contention urged by Mr. Rajah Aiyar relates to the propriety of awarding a joint decree against both the defendants. He urged that the present case is not one of "joint tort" and that it was open to the Court to assess separately the damages payable by each of the two defendants. (See *Ramratan Kapali* v. *Aswini Kumar Dutta*[2].) We are prepared

1 (1888) 13 A.C. 1. 2. (1910) I.L.R. 37 Cal. 559.

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to assume that the present is not an instance of a joint tort. (See *The Kourski*[1].) But it will not necessarily follow therefrom the damages should or could be assessed separately as against each of the defendants. The case will fall in the category of what is described by Sir Frederick Pollock as injury arising from "composite negligence". (*See* Pollock on Torts, 13th Edition, page 485.) After referring to the authorities bearing upon instances of this kind, the learned author observes that in such a case, the plaintiff is not bound to a strict analysis of the proximate or immediate cause of the event to find out whom he can sue. Subject to the rules as to remoteness of damage, the plaintiff is entitled to sue all or any of the negligent persons and it is no concern of his whether there is any duty of contribution or indemnity as between those persons though in any case he cannot recover in the whole more than his whole damage. This principle was applied by the majority of the Court of appeal in Ireland in *Mckenna* v. *Stephens and Hull*[2]. (*See also* Beven on Negligence, p. 79.) The case in *Piper* v. *Winnifrith and Leppard*[3], to which Mr. Rajah Aiyar drew our attention in this connection, is clearly distinguishable. What happened in that case was that two dogs belonging to two different owners who did not act in concert had injured the plaintiff's animal and he sued the owners of the dog for damages. This was certainly not a case either of joint tort or of a composite act in the sense that the act of or omission of the one without the act or omission of the other would not have caused the injury. *Croston* v. *Vaughan*[4] does not help the appellant either. The Court in that case no doubt fixed the amount respectively payable by the two wrongdoers, but was done in the exercise of the power expressly conferred on the Court by the recent statute of 1925. It must also be noted that that was a decision only between the defendants *inter se* and did not affect the right of the plaintiff to recover the full amount from either of the defendants. It was pointed out that the plaintiff was not even a party to the appeal and his rights accordingly remained unaffected. Whether, in this country, Courts will in the absence of a corresponding statutory provision have the power to fix contribution as between tort-feasors

1. (1924) P. 140.
2. (1923) 2 Irish Reports 112.
3. (1917) 34 T. L. R. 108.
4. (1938) 1 K.B. 540.

it is not necessary for the purpose of this case to consider. We are not prepared to do anything which will affect the plaintiff's right to recover the full amount of damages from either of the defendants. The appeal fails and is dismissed with costs of the plaintiffs-respondents. The liquidator appellant will not be personally liable for the costs.

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S.V.V. —— *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Patna.]

PRESENT:—LORD THANKERTON, LORD ROMER AND SIR SHADI LAL.

Raja Shyam Sunder Singh and others .. *Appellants**

v.

Kaluram Agarwala and others .. *Respondents.*

P.C. — Raja Shyam Sunder Singh v. Kaluram Agarwala.

Civil Procedure Code (V of 1908), O. 21, r. 90—Execution sale—Irregularity—Fresh sale proclamation—Waiver of objection—Distinction between waiver and admission—Effect of attachment.

There is a distinction in law between waiver and admission; in the case of waiver, a person is not to be held to have waived a right of which he was reasonably ignorant, but in the case of a representation or admission which is acted on, the party making it cannot plead ignorance unless it is induced by the other party, for, if he does not choose to enquire beforehand, he takes the risk of error.

The waiver of the necessity for a fresh sale proclamation necessarily implies a waiver of objection to any defect appearing on the face of the sale proclamation.

The main purpose of attachment is to prevent the transfer or changing of the property attached by the judgment-debtor.

J. M. Pringle for Appellants.

P. E. Pugh and *W. Wallach* for Respondents.

17th June, 1938. Their Lordships' judgment was delivered by

LORD THANKERTON.—Appellant No. 1, whose property has been sold in execution, and the other two appellants, who are receivers in charge of his properties, appeal, in an application by them under O. 21, r. 90, of the Code of Civil Procedure, to have the execution sale set aside, against the decree of the High Court of Judicature at Patna dated the 27th November, 1935, which confirmed the sale, setting aside the order of the Subordinate Judge of Dhanbad dated the 18th September, 1933, which had set the sale aside.

Lord Thankerton.

* P. C. Appeal No. 3 of 1937. 17th June, 1938.
Patna Appeal No. 35 of 1935.

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Lord Thankerton.

Under r. 90 it is necessary, in order to have the sale set aside, to prove (*a*) material irregularity or fraud in publishing or conducting the sale, and (*b*) that the applicant has sustained substantial injury by reason of such irregularity or fraud.

Respondent No. 3 is the representative of his father, who obtained an *ex parte* decree dated the 31st July, 1931, in the High Court of Judicature at Fort William in Bengal against appellant No. 1 for the payment of Rs. 38,392-4-8, which was transferred to the Court of the Subordinate Judge of Dhanbad for execution, application being there made by the decree-holder on the 23rd September, 1931, for execution by attachment and sale of two of the said appellant's properties. The Subordinate Judge states the subsequent proceedings as follows:—

> "The first property as described in the execution petition is Pandra 1st Kismat, Touzi No. 21 of Manbhum Collectorate, pargana Pandra—the total land revenue payable being Rs. 107-2-6¼ and the local cess payable for the property being Rs. 4,184-10-0. The other property is Pandra 3rd Kismat, Touzi No. 23 of Manbhum Collectorate, pargana Pandra, and the total land revenue payable in respect of it was Rs. 53-10-8 and the total cess payable was Rs. 1,621-14-6. The decree-holder did not give any value of the properties in his execution petition. The first process issued in the case was the process of attachment in respect of both the Touzi which purports to have been served on 28th November, 1931. Thereafter a notice under O. 21, r. 66 of the Civil Procedure Code, was issued and served on the judgment-debtor. The judgment-debtor appeared on the 8th January, 1932, and took time to file objection regarding valuation. On the 15th January, 1932, he filed an objection alleging the value of Touzi No. 21 to be 15 lacs and that of Touzi No. 23 to be 10 lacs; on the 23rd January, 1932, when the Court proceeded to enquire about the valuation of the property the decree-holders' pleader stated that he had no objection to the judgment-debtor's valuation being accepted without prejudice. The Court ordered the sale proclamation to be issued inserting the judgment-debtor's valuation. There was a miscellaneous appeal against that judgment by the judgment-debtor, and the sale of the property, which was to take place on the 15th March, 1932, was stayed by order of the Honourable High Court. On the 16th March, 1932, the aforesaid Civil Revision case was disposed of, and the order of this Court regarding valuation was set aside and the Court was directed to decide the question of valuation on the evidence. Thereafter on the 2nd May, 1932, there was an enquiry by this Court, and the Court valued Touzi No. 23, which the decree-holder wanted to sell, at 2 lacs, and the sale proclamation in respect of that Touzi was issued, fixing 15th June, 1932, for sale. That sale proclamation was not served for want of identifier, and on decree-holder's petition filed on the 25th May, 1932, a fresh sale proclamation was issued in respect of Touzi No. 23 fixing 15th July, 1932, for sale at noon. On that date the judgment-debtor applied for one month's time to pay up the decretal amount waiving the right to issue a fresh sale proclamation. Time was allowed and the sale was adjourned to 15th August, 1932, at noon."

It is unnecessary to detail the subsequent proceedings, as the appellants now raise no separate point as to them; it is

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sufficient to state that the judgment-debtor obtained three further adjournments of the sale date on petitions in similar terms to that of the 15th July, 1932, the date of sale being ultimately fixed for the 27th September, 1932. A similar petition by the judgment-debtor on this last date was rejected, and the sale took place on the 27th September, and the property was purchased by respondents Nos. 1 and 2 for Rs. 60,000. It may be added that on the 20th August, 1932, the judgment-debtor had paid Rs. 5,000 towards the decretal amount.

The only case of fraud alleged in the plaint was found to be untrue by the Subordinate Judge, and the appellants acquiesced in that decision. The case now rests solely on irregularities in publishing and conducting the sale. The Subordinate Judge found that certain material irregularities had occurred in publishing and conducting the sale, with the result that the property was sold for the small sum of Rs. 60,000, though it was valued at over three lacs of rupees, and that appellant No. 1 had thereby suffered substantial loss. The learned Judge rejected the respondents' contention, referred to later, that the said appellant had waived any objection to these irregularities, and, as already stated, he set aside the sale. On appeal by the present respondents, the High Court reversed this decision and confirmed the sale, on the ground that in his petition of the 15th July, 1932, the judgment-debtor had stated that the sale proclamation had been properly served and that if time were granted he would not insist on the issue of a fresh proclamation, that time was granted on that and three subsequent occasions, always on the same condition and that, apart from fraud, his only case on which had been rejected by the Subordinate Judge, the judgment-debtor had waived any right to object to the irregularities found by the Subordinate Judge. The learned Judges, holding this view, did not discuss the correctness of the Subordinate Judge's findings as to the irregularities, but, on the question of substantial injury to the applicant, they stated:

"The many opportunities which the judgment-debtor has had prior to the sale, for the purpose of enabling him to avert the sale by raising on the property the money necessary to meet his decretal debt, indicate that the price realised is not so grossly inadequate in the present circumstances as to enable it to be held that the property has been sold for a grossly inadequate price due to irregularities in the proceedings."

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While their Lordships find great force in this observation, they find it unnecessary to form a concluded opinion on this point, as they agree with the conclusion otherwise arrived at by the learned Judges.

The material part of the judgment-debtor's petition of the 15th July, 1932, which is repeated in almost identical language in the three subsequent petitions, is as follows:

> "Another date may be fixed by allowing one-month's time for payment to the decree-holder after securing money. The sale proclamation has been properly served. If the money is not paid on the next date fixed the sale will take place on the strength of this proclamation. No fresh proclamation will have to be issued."

The judgment-debtor obtained, on the strength of these representations, an extension of time for payment of the decretal amount on four occasions. In the first place, he waived the necessity for a fresh sale proclamation, as is provided in O. 21, r. 69 (2). In the second place, he represented and thereby admitted that the sale proclamation had been properly served. There is a distinction in law between waiver and admission; in the case of waiver a person is not to be held to have waived a right of which he was reasonably ignorant, but in the case of a representation or admission which is acted on the party making it cannot plead ignorance unless it is induced by the other party, for, if he does not choose to enquire beforehand, he takes the risk of error.

The irregularities found by the Subordinate Judge on which the appellants now rely are as follows:—

I. As to the attachment:—

(*a*) the Subordinate Judge had grave doubt of the truth of the service report of the peon,

(*b*) that the copy of the attachment order was affixed at Poddardih, which is on Touzi No. 21, and on no part of Touzi No. 23, and

(*c*) that no copy was sent to the Collector of Burdwan, in which district parts of Touzi No. 23 are situate.

II. As to the sale proclamation:—that the contents were defective, in that the description of the property was insufficient.

As regards the appellants' objection to the sale proclamation, their Lordships consider that the waiver of the necessity for a fresh proclamation necessarily implied a waiver of objection to any defect appearing on the face of the sale proclama-

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tion, as the appellant No. 1 must have been fully aware of its terms in view of his miscellaneous appeal to the High Court. The facts in this case are stronger against the said appellant than those in *Girdhari Singh* v. *Hurdeo Narain Singh*[1] in which this Board held that the waiver covered any objection to an error in the statement of the Government Revenue, as the judgment-debtor must have had the opportunity of seeing the copy affixed in the Court House. This objection of the appellants accordingly fails.

As regards the appellants' three objections to the attachment, their Lordships find it unnecessary to consider the correctness of the findings of the Subordinate Judge, and they have not heard the respondents on this question. Their Lordships do not consider that the waiver of any necessity for a fresh sale proclamation would imply a waiver of the right to object to any of the three irregularities in the attachment found by the Subordinate Judge. While much might be said for the view that the repeated admissions by the judgment-debtor in this case, on the faith of which he secured delay, excluded any objection by him, in the absence of fraud, to irregularities in the attachment, their Lordships find it sufficient for disposal of this appeal to hold that, assuming the findings of the Subordinate Judge to be correct, these irregularities did not so materially affect the proceedings on the sale day as to justify the setting aside of the sale. It must be remembered that the main purpose of attachment is to prevent the transfer or charging of the property attached by the judgment-debtor. No date of sale is fixed until the sale proclamation, and, in view of their Lordships' decision, it must be taken that the sale proclamation and the subsequent proceedings were regular. In this case these proceedings extended over several months, and any effect of the irregularities in the attachment on the actual sale is highly problematical and remote and is insufficient to form the basis of the substantial injury which the appellants require to prove. Their Lordships are therefore of opinion that the appellants' objections to the attachment do not avail them in the present application to have the sale set aside.

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1. (1876) L.R. 3 I.A. 230.

P.C. — Raja Shyam Sunder Singh *v.* Kaluram Agarwala. — Lord Thankerton.

Their Lordships will accordingly humbly advise His Majesty that the appeal should be dismissed with costs, and that the decree of the High Court should be affirmed.

Solicitors for Appellants: *W. W. Box & Co.*

Solicitors for Respondents: *A. J. Hunter & Co.*

R.C.C. —— *Appeal dismissed.*

B.V.V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Ponnuswami Chettiar .. *Appellant* in both 1st Defendant)*

v.

Ellasari Obul Reddi .. *Respondent in both (Plaintiff).*

Ponnuswami Chettiar *v.* Obul Reddi.

*Madras Estates Land Act (I of 1908), Ss. 50 and 125—Sale of land for arrears of rent by Collector—Suit already on a mortgage of the same land—*Lis pendens *whether affecting sale by Collector.*

The sale of land by the Collector for arrears of rent of the land on which those arrears were due to the landholder, is not affected by a pending suit on a mortgage executed by the ryot who is in default.

Vellappayal Ambalam v. *Karuppiah Pillai,* (1911) I.L.R. 37 Mad. 49 and observations in *Kadir Mohideen Marakkayar* v. *Muthukrishna Aiyar,* (1902) 12 M.L.J. 368: I.L.R. 26 Mad. 230 at 236, followed.

Appeals against the decrees of the District Court of Chingleput in Appeal Suits Nos. 178 and 179 of 1933 preferred respectively against the decrees of the Court of the District Munsiff of Trivellore in O.S. Nos. 422 and 692 of 1932.

P. S. Kothandapani for Appellant.

G. Ramakrishna Ayyar and *T. Muniswami Reddi* for Respondent.

The Court delivered the following

JUDGMENT.—These appeals arise out of proceedings brought for possession of land by a purchaser in a rent sale under the Estates Land Act from a purchaser in a sale under a mortgage decree. The preliminary decree on the mortgage in favour of the appellant was dated 24th February, 1927. The revenue sale in favour of the respondent was on 5th September, 1927. The final decree in the mortgage suit was on 3rd December, 1927. The decree-holder purchaser got possession on 31st March, 1931. Hence the proceedings by the plaintiff to

* S. A. Nos. 921 and 922 of 1934. 4th October, 1938.

enforce his rights under the rent sale and to get possession from the mortgagee decree-holder court-auction purchaser who is the appellant here.

Now the argument for the appellant is that the sale by the Collector for arrears of rent due to the landholder is affected by *lis pendens* under S. 52 of the Transfer of Property Act and that no title can pass to the purchaser in the rent sale which was effected without the consent of the Court which passed the mortgage decree. This contention overlooks the fact that the sale by the Collector was in fact a sale held to enforce the paramount right of the landholder to his rent, which under S. 5 of the Estates Land Act is a first charge on the land. It also ignores the fact that by virtue of S. 125 of the same Act when the land is sold for arrears of rent in respect thereof the purchaser takes free of all encumbrances except such as have been created with the landholder's permission or have been created prior to the passing of the Act. It is not suggested that the mortgages under which the appellant got his decrees fall under either of these two categories. In such circumstances it is difficult to see how a decree under a mortgage over land which is subject to a prior statutory charge for the rent due to the landholder, can affect a sale at the instance of the landholder, for the realisation of his dues charged upon the land. No precise case under the Estates Land Act has been cited on this point but there is ample authority for a similar proposition with regard to sales for arrears of land revenue due to the Crown pending a mortgage suit against the ryot. It is well established that such a sale for arrears of land revenue is not affected by *lis pendens* (vide *Vellappayal Ambalam* v. *Karuppiah Pillai*[1] and the observations in *Kadir Mohideen Marakkayar* v. *Muthukrishna Aiyar*[2]). I have no hesitation in holding that the sale by the Collector for arrears of rent of the land on which those arrears were due to the landholder, is not affected by a pending suit on a mortgage executed by the ryot who is in default.

The appeals are therefore dismissed with costs. (One set.)

K.C. ——— *Appeals dismissed.*

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1. (1911) I.L.R. 37 Mad. 49.
2. (1902) 12 M.L.J. 368: I.L.R. 26 Mad. 230 at 236.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

S. A. Ramanathan Chettiar .. *Appellant** (*Defendant*)

v.

M. P. Palaniappa Chettiar and others .. *Respondents* (*Plaintiffs*).

Ramanathan Chettiar *v.* Palaniappa Chettiar.

Judgment of appellate Court—Allegation of false facts regarding defendant's minority in written statement—Non-contradiction—Separate suit filed to set aside decree in previous suit—Decree whether vitiated by fraud—False allegation whether constitutes fraud on Court.

Where in a case the making of a false statement regarding the minority of the defendant, knowing it to be false, in the written statement could not be regarded as extrinsic to the proceedings of the Court in that the whole of the written statement should have been deemed to have been considered by the trial Court and the High Court on appeal, and if for some reason or other the Courts accepted a certain allegation as true which was subsequently alleged to be false, there was no ground for vacating the decree of the appellate Court on the ground of fraud. The remedy is pointed out in *Chinnayya* v. *Ramanna*, (1913) 25 M.L.J. 228: I.L.R. 38 Mad. 203 at 206 and 207, either by way of appeal or by way of review and not by a separate suit as in this case. In this case the plaintiffs themselves were to blame for not contradicting the allegation on which everything depended in the appeal when the appeal was being argued. It was more their carelessness than the recklessness of the defendant-appellant that was responsible for the decision against them by the appellate Court. In any case there was no fraud of the kind which alone can vitiate a decree passed by a Court.

Appeal against the decree of the Court of the Subordinate Judge of Devakottai in O. S. No. 3 of 1935.

A. Swaminatha Aiyar and *S. Thiyagaraja Aiyar* for Appellant.

K. Rajah Aiyar, *V. Ramaswami Aiyar* and *N. G. Krishna Aiyangar* for Respondents.

The judgment of the Court was delivered by

Pandrang Row, J.

Pandrang Row, J.—This appeal is from the decree of the Subordinate Judge of Devakottai dated 10th September, 1935, declaring that the judgment passed by this Court in Appeal No. 400 of 1928 on 13th February, 1934, reversing the decree of the lower Court in O. S. No. 33 of 1927 was obtained by fraud of the defendant in the present suit and was therefore null and void as against the plaintiffs therein. O. S. No. 33 of 1927 was a suit for contribution by the plaintiffs based on a certain decree passed against two firms, namely, the M. P.

* Appeal No. 449 of 1935. 20th October, 1938.

Firm represented by the present plaintiffs and the S. A. Firm of which the then proprietor was the present appellant, that is, the defendant in the suit. That suit was first of all decreed by the Subordinate Judge and when the decree came up in appeal it was set aside on the ground that the joint decree on the basis of which contribution was claimed was not a valid decree as the defendant was a minor at the time the decree was passed and was not then represented by a guardian *ad litem* and the suit was remanded for disposal on the alternative basis of a right of contribution based on the original debt in respect of which that joint decree had been made, that is to say, the joint promissory note executed on behalf of the two firms to the Bank of Rangoon. No doubt the basis of the High Court's judgment in appeal was the minority of the defendant at the time the decree was passed in the Burma Court. This minority was alleged by the defendant in his written statement and was not denied by the plaintiffs at any time either during the trial or during the hearing of the appeal or on their behalf by their Counsel. The entire argument in this Court when that appeal was heard was on the admitted footing that the defendant was a minor at the time when the decree was passed by the Burma Court. It is admitted even in the present litigation that the plaintiffs themselves honestly believed that the allegation by the defendant of his minority at the time was true and therefore they did not take the trouble of verifying the truth of that allegation. According to them they came to know that that allegation was false, casually, when they had a talk with certain Chettiars about five months after the High Court's decree and when the suit was pending, the further enquiry was ordered by the High Court. No doubt it is now established beyond doubt that the defendant was not a minor at the time but had attained majority in December, 1909, whereas the decree was passed in 1912. The obvious course in these circumstances was for the plaintiffs to have moved for review of the judgment by the High Court. They did not however take this obvious course but preferred for reasons which are difficult to find to institute a separate suit in the lower Court itself to set aside the judgment of the High Court in appeal as against themselves on the ground that it had been obtained by fraud of the defendant appellant in the appeal. The lower Court has given a declaration as prayed for and the defendant appeals.

Ramanathan Chettiar v. Palaniappa Chettiar.

Pandrang Row, J.

The only point for determination in this appeal is whether the judgment of the High Court in appeal dated 13th February, 1934, can be set aside on this ground, namely, that it was based on the footing that the defendant was a minor at the time of the decree in the Burma suit which was the result of an allegation made by the defendant in his written statement and repeated by his Counsel in the appellate Court and relied upon in his argument. Can this be regarded as fraud which would vitiate the decree of the High Court? We are of opinion that it cannot be so regarded. The mere making of a false allegation in a written statement even with knowledge of its falsity, while it would amount to perjury, would not necessarily amount to a fraud on the Court. The other party had an opportunity of knowing what had been said and if any allegation was according to them not true, it was open to them to deny it and lead evidence on the point. In the present case what the plaintiffs did was not only not to deny it in the trial Court but also not to deny it in the appellate Court even when they knew perfectly well that the whole judgment was going to be reversed on this ground of the minority of the defendant at the time of the decree in the Burma suit. The fraud which vitiates a decree must be something extrinsic to the proceedings pending before the Court and the mere making of a false statement in the pleadings or during the examination of witnesses by witnesses would not amount to a fraud of the kind which vitiates a decree. The Courts are there to distinguish truth from falsehood so far as pleadings and evidence are concerned, and though the Courts may be mistaken, it cannot be said that the making of such false statements in the pleadings or evidence amounts to a fraud which vitiates the decrees passed by the Courts. It is conceded that a decree cannot be set aside on the ground that it was obtained by perjured testimony. This is laid down by the Full Bench in *Kadirvelu Nainar* v. *Kuppuswami Naicker*[1]. They approved the reasoning of Sundara Aiyar, J., in *Chinnayya* v. *Ramanna*[2]. It is perhaps desirable to quote a few observations from that case, *Chinnayya* v. *Ramanna*[2]:

"The question is what would amount to fraud which would entitle an unsuccessful litigant to get the decree vacated. He cannot, it is clear, be allowed to get round the rule of *res judicata* and to prove that the judgment

1. (1918) 34 M.L.J. 590: I.L.R. 41 Mad. 743 (F.B.).
2. (1913) 25 M.L.J. 228: I.L.R. 38 Mad. 203 at 206 and 207.

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given by the Court was wrong, because it came to a wrong conclusion on the evidence before it. It follows from this that the Court's conclusion both on the construction to be put on the evidence placed before it and on the inference to be drawn from such evidence as well as on the trustworthiness of the evidence should be regarded as final. If the Court acts erroneously in forming its judgment on any of these matters, the proper remedy is to invoke the help of the appellate tribunal where an appeal is allowed by law. Another mode of rectifying an erroneous judgment is to apply for review of judgment. The unsuccessful party has, in such an application, an opportunity to adduce any evidence which he failed to adduce at the hearing and which he could not, with all proper diligence, have then adduced. It cannot be doubted that, in such cases, he cannot institute a fresh suit to get the judgment vacated. The allegation of fraud for vacating a judgment, therefore, must be extraneous to everything which has been adjudicated on by the Court and not any fraud which has already been dealt with by the Court."

In the present case the making of a false statement knowing it to be false in the written statement cannot be regarded as extrinsic to the proceedings in the Court. The whole of the written statement must be deemed to have been considered by the Court before it pronounced its judgment and if for some reason or other the Court accepted a certain allegation as true which is subsequently alleged to be false there is no ground for vacating the decree on the ground of fraud. The remedy is as pointed out in *Chinnayya* v. *Ramanna*[1] either by way of appeal or by way of review. In this case the plaintiffs themselves are to blame for not contradicting the allegation on which everything depended in the appeal when the appeal was being argued. It is more their carelessness than the recklessness of the defendant appellant that was responsible for the decision against them by the appellate Court. In any case there was no fraud in our opinion of the kind which alone can vitiate a decree passed by a Court. For these reasons the appeal must be allowed and the decree of the Court below set aside and the suit dismissed with costs in both the Courts.

K. C. —— *Appeal allowed.*

1. (1913) 25 M.L.J. 228: I.L.R. 38 Mad. 203 at 206 and 207.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:— MR. JUSTICE ABDUR RAHMAN.

Thumbalam Gooty Thimmiah .. *Petitioner** (*1st Creditor*)

v.

The Official Receiver of Bellary and others .. *Respondents* (*Respondents*).

Thimmiah *v.* Official Receiver of Bellary.

Provincial Insolvency Act (V of 1920), S. 61 (5)—Debt of father untainted by immorality—Creditor of father on insolvency of both father and son claiming priority—Right to priority over other creditors whether exists—Consequences of insolvency of both father and son, what are.

On the question whether a creditor in insolvency who happens to hold a debt free from any taint of immorality or illegality incurred by a father as manager of a joint Hindu family, has any priority over the debts incurred by a son who was a junior member of the joint family, when both the father and the son were adjudicated insolvents by one order in an insolvency petition,

Held, that it is obviously the policy of the Insolvency Law to distribute the estate among the creditors fairly and unless a preference was given by the Act to any particular debt, it must necessarily be held to fall within the sub-cl. 5 of S. 61 of the Provincial Insolvency Act and no priority can legitimately be claimed in regard to the same. Viewed in the light of this section the unrealised simple debts of the father and that of the son would stand on the same footing. The fact that the father and the son were adjudicated jointly on the same petition should not make any difference. A joint application and even an order passed to adjudicate them both does not affect the situation. If the application and the order are split into two, and taken to have been presented and passed separately against the father and the son, the creditors of the one will not be entitled to claim any priority or a share in the property of the other. It would be difficult of course if a debt is proved to be payable not only jointly but also personally by the father and the son in which case the property of both will be jointly liable.

It is impossible for the Official Receiver to claim any more rights than the father possessed himself.

Baluswami Aiyar, In re, (1928) 55 M.L.J. 175: I.L.R. 51 Mad. 417 (F.B.).

The father's power of disposal would cease to exist as soon as the son's property comes on his insolvency to vest in the Official Receiver.

Petition under S. 75, cl. (3) of Act V of 1920 praying the High Court to revise the order of the District Court of Bellary dated 1st March, 1937 and made in C. M. A. No. 30 of 1936 preferred against the order of the Court of the Official Receiver of Bellary dated 13th August, 1936, in I. P. No. 40 of 1934 on the file of the District Court, Bellary.

D. R. Krishna Rao for Petitioner.

V. S. Narasimhachar for Respondents.

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* C. R. P. No. 988 of 1937. 2nd November, 1938.

The Court delivered the following

JUDGMENT.—The only question which has to be determined in this revision is whether a creditor in insolvency who happens to hold a debt, free from any taint of immorality or illegality, incurred by a father as manager of a joint Hindu family has any priority over the debts incurred by a son who was a junior member of the joint family when both the father and the son were adjudicated insolvents by one order in an insolvency petition. In order to support his contention that the creditors of the father would take precedence over those of his son the learned Counsel for the petitioner tried to invoke the principle under which the father's power to sell the joint family property for his just debts has been held to subsist at the time of partition and bearing his powers as a *karta* of the family in mind the Courts have usually provided for the payment of such debts out of the joint estate before the properties belonging to the joint Hindu family have been partitioned. It has been submitted that if it were right to give priority to the debts incurred by the father, which were neither illegal nor immoral, in a suit for partition, it would be right to follow the same principle in cases where the property of both the father and the son vests in the Official Receiver on account of their insolvency and to give priority to such of the debts incurred by the father as were binding on the family. The second argument advanced to achieve the same object was that inasmuch as the father's power of disposal over his son's share in the joint family property must be held to have vested in the Official Receiver, it can be exercised by him on the father's adjudication unaffected by the consideration that the son was also adjudicated along with his father. It was therefore contended that the sale proceeds of the son's share in the joint family property should be first applied to discharge the debts incurred by the father and the balance alone, if any, should be paid to the creditors of the son.

Before these contentions are examined, it would be well to remember that in this case there were other sons who were members of the joint family at the time when the father and the son were adjudicated. They were not declared insolvents and since the insolvency of a member of a joint Hindu family does not *ipso facto* affect a severance in his status, it would follow that those that were adjudicated continued to remain

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members of the joint family in spite of their insolvency. For this reason, if for no other, the principle underlying the first contention cannot be applied to this case. The joint family has not been divided so far and there is thus no scope for the argument that the debts incurred by the father should be paid out of the family property, the whole of which has not even vested in the Official Receiver. Moreover the appellant who is a simple money creditor cannot be said to have a charge on the family property, although it may have been possible for him to proceed against it in execution of a money decree as long as his debt was a just one and binding on the family. This could however be done only if the shares of the property belonging to the other members of the family were still available and had neither been alienated nor got at by their creditors who might have been more vigilant than those of the father. It cannot be reasonably contended that a son's creditor would not be entitled to recover the debt due to him out of the son's undefined share in the family property and would have to wait until all the creditors of his father have been paid out of the family estate. If this were so, a suit by a son's creditor for the recovery of his debt would be almost an impossibility and would have necessarily to take the form of an administration suit in which the father's creditors would have to be first ascertained and their debts provided for or paid before a son's creditor may hope to realise his debt out of the residue. This would be the logical result of the contention raised by the learned Counsel for the appellant but he was not prepared to go to that length when he was arguing his case before me. It is fairly obvious that the proposition, even if urged, could not have been given effect to. As for the second contention, it is correct to say that in the insolvency of a father, his power of disposal over his son's share in the joint family property would vest in the Official Receiver; but it must be observed in this connection that there is a great deal of difference between the power of disposal in a property and the property itself. The former does but the latter does not vest in the Official Receiver on the father's adjudication. As a direct consequence of this distinction it would follow that if the son's right in the property has been attached, alienated or even partitioned before the power of disposal has been exercised by the Official Assignee, the power of disposal would cease to exist. The existence of the

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property and of a joint status are *sine quo non* for the continuance of that power. When the property has ceased to belong to the son or the son's right to deal with the property has come to an end, or when the son does not remain joint with the father, his right to deal with his son's share, and that was all which could have devolved on the Official Receiver by operation of law, would come to an end (see *Subraya* v. *Nagappa*[1] and *Gopalakrishnayya* v. *Gopalam*[2]). It is thus impossible for the Official Receiver to claim any more rights than the father possessed himself. (*Baluswami Aiyar*, In re[3].) If this is the law, the father's power of disposal would cease to exist as soon as the son's property comes on his insolvency to vest in the Official Receiver. The contention therefore that the father's power of disposal continues to remain in him or vests in the Official Receiver on his adjudication in spite of the son's insolvency is incorrect and must be overruled.

These contentions however can be decided on a much simpler ground. When dealing with the matter in an insolvency proceeding one must, unlike a partition suit, necessarily look into the provisions of the Insolvency Act—Provincial or Presidency Towns whichever be applicable—and try to ascertain the rules made by the legislature. It cannot be denied that the provisions of these Acts must be taken to be exhaustive so far as they go and there is no room for the contention that the doctrines of a personal law must be read in conjunction with the provisions of these acts so as to extend or limit their operation. If one looks to the provisions contained in S. 61 of the Provincial Insolvency Act, it would be found to provide in sub-cl. (5) that all debts entered in the schedule have to be paid rateably according to the amount of such debts and without any preference except to those which have been otherwise specified in the Provincial Insolvency Act. The debts payable to secured creditors have been exempted by S. 28 of the Act and S. 61 cannot therefore affect their rights of priority. The other debts to which priority has been given are mentioned in such cl. (1) of S. 61. The learned Counsel for the petitioner has not been able to point to any provision in the Provincial

1. (1908) I.L.R. 33 Bom. 264.
2. (1928) 54 M.L.J. 674: I.L.R. 51 Mad. 342.
3. (1928) 55 M.L.J. 175: I.L.R. 51 Mad. 417 (F.B.).

Insolvency Act under which he could claim priority for the debt in question and so far as proceedings in insolvency are concerned, the petitioner must, as provided in sub-cl. (5), share rateably without any preference. It is obviously the policy of the Insolvency Law to distribute the estate among the creditors fairly and unless a preference was given by the Act to any particular debt, it must necessarily be held to fall within the sub-clause and no priority can legitimately be claimed in regard to the same. Viewed in the light of this section the unrealised simple debts of the father and that of the son would stand on the same footing. The fact that the father and the son were adjudicated jointly on the same petition should not make any difference. A joint application and even one order passed to adjudicate them both does not affect the situation. If the application and the order are split into two, and taken to have been presented and passed separately against the father and the son, the creditors of the one will not be entitled to claim any priority or a share in the property of the other. It would be different of course if a debt is proved to be payable not only jointly but also personally by the father and the son, in which case the property of both will be jointly liable. This is how the matter should be dealt with in these proceedings. What will happen to the residue, if some remains after such of the joint debts as have been indicated above and the debts payable only by the son have been paid in their entirety and if the debts of the father are not satisfied fully, need not be gone into by the Insolvency Court which will have to deliver it to the son. It may be open then to the father's creditors to proceed against the son in separate and appropriate proceedings but it is unnecessary for me to consider that contingency here.

The result is that this revision fails and is dismissed with costs.

K. C. ——— *Petition dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE WADSWORTH AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

Ayyappa Naicker .. *Petitioner** (*Petitioner*)

v.

Kasiperumal Nayakar and others .. *Respondents* (*Respondents*).

F.B.
Ayyappa Naicker
v.
Kasiperumal Nayakar.

Civil Procedure Code (V of 1908), O. 21, r. 90—Person who has attached before judgment—If a person entitled to apply under O. 21, r. 90 to set aside execution sale held after his attachment—"Person whose interests are affected by the sale"—Meaning of.

A person who has obtained an attachment before judgment is by virtue of the attachment itself "a person whose interests are affected by the sale" within the meaning of O. 21, r. 90 of the Civil Procedure Code when the property attached is later sold in execution of a decree obtained by another person. The fact that he has not obtained a decree at the date of the application does not make any difference. The words "a person whose interests are affected by the sale" are not restricted to persons having a proprietary or possessory title in the property but are intended to apply also to persons whose pecuniary interests are affected by the sale.

Where therefore a person obtained an order for attachment of certain properties before judgment and in due course obtained a decree, but before the date of the decree, the attached properties were sold in execution of a decree obtained by another creditor, the attaching creditor is a person entitled to apply under O. 21, r. 90 of the Civil Procedure Code, though the decree was obtained after the sale.

Kathiresan Chettiar v. *Ramasami Chettiar*, (1914) 27 M.L.J. 302, overruled.

Petition under S. 25 of Act IX of 1887, praying the High Court to revise the order of the Court of the Subordinate Judge of Tuticorin dated 22nd August, 1934 and made in C.M.A. No. 32 of 1933 preferred against the order of the Court of the District Munsif of Tuticorin in E.A. No. 922 of 1933 in S.C.S. No. 552 of 1932, Sub-Court, Tuticorin.

K. V. Sesha Aiyangar for Petitioner.

A. Swaminatha Aiyar and *S. Thyagaraja Aiyar* for Respondents.

7th November, 1938. The Court (Varadachariar, J.) made the following

ORDER OF REFERENCE TO A FULL BENCH.

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*C.R.P. No. 1995 of 1934. 13th December, 1938.

F.B.

Ayyappa Naicker v. Kasi-perumal Nayakar.

The point arising for decision in this Civil Revision Petition is whether the petitioner had a *locus standi* to apply under O. 21, r. 90, Civil Procedure Code, to set aside the sale complained against. That this is a question of jurisdiction within the meaning of S. 115, Civil Procedure Code, has been held in *Sundaram* v. *Mamsa Mavuthar*[1] (which related to O. 21, r. 89).

The relevant facts are that the petitioner attached certain properties before judgment and in due course obtained a decree; but before the date of that decree, the attached properties were sold in execution of a decree obtained by another creditor. As soon as the petitioner obtained his decree, he filed the present application under O. 21, r. 90 to set aside the execution sale on certain grounds.

The Courts below have dismissed his petition, holding that he is not entitled to apply under O. 21, r. 90. A decision of a Division Bench of this Court in *Venkatesha Kamthi* v. *Vitla Bhakta*[2] was brought to the notice of the lower appellate Court and apparently of the First Court also. The learned Subordinate Judge has attempted to distinguish that case, but I am not satisfied that the distinction is beyond doubt. The lower Court assumes that in that case the decree had probably been obtained before the Court auction sale. The records of that case are reported to have been destroyed and I am not, therefore, able to verify whether this was so or not. Even assuming that the facts were as assumed by the lower appellate Court, I am very doubtful whether those facts furnish a sufficient ground for distinction. I can understand the view taken in *Kathiresan Chettiar* v. *Ramasami Chettiar*[3] that except where the attaching decree-holder has applied for rateable distribution, he has no *locus standi*, merely on the ground of his attachment, to apply under O. 21, r. 90. This view has, however, been departed from by a Division Bench in *Venkatesha Kamthi* v. *Vitla Bhakta*[2], though it does not appear from the judgment whether the earlier case was brought to the notice of the learned Judges or not. There has been considerable diversity of opinion amongst the various High Courts as to the import of the expression "whose interests are affected by the sale" in O. 21,

1. (1921) 40 M.L.J. 497 : I.L.R. 44 Mad. 554 (F.B.).
2. (1933) 64 M.L.J. 605.
3. (1914) 27 M.L.J. 302.

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r. 90. The use of the plural "interests" has generally been relied on as supporting the contention that what is referred to by that expression is not merely an interest *in the property*, but any kind of pecuniary benefit that the applicant is likely to have derived if the sale had not taken place or is likely to derive if the sale is set aside. This apparently is the basis of the decision in *Venkatesha Kamthi* v. *Vitla Bhakta*[1].

In applying the rule to persons who had obtained attachment before judgment, a distinction has been drawn between—

(1) cases where the decree had been passed before the sale,

(2) cases where the decree had been passed after the sale but before the application under O. 21, r. 90, and

(3) cases where no decree had been obtained even on the date of the application under O. 21, r. 90.

(Cf. *Jogendra Nath Chatterjee* v. *Monmotha Nath Ghosh*[2], *Rameshwar* v. *Hari Prasad*[3], *Gopinath* v. *Kukari Protab*[4], *Baidya Nath* v. *Hemlata Dasi*[5], *Bulanda Bashini* v. *Pran Gobinda*[6] and *Gobinda Prosad* v. *Brindaban Chandra*[7].)

It is not easy to reconcile the several dicta to be found in these cases. Whatever may be said of cases where before the decree is obtained, the property attached before judgment has survived to coparceners in a joint Hindu family, I do not see sufficient basis for the distinction suggested in a case like the present between a person who has obtained a decree before the sale complained against and one who obtains a decree only after the sale but before he files the application under O. 21, r. 90.

The question is one that arises frequently and involves a point of procedure on which a uniform and certain rule is desirable. In view of the conflict in the authorities, it is better that the matter is considered by a Division Bench and, if they agree, it will even be desirable that the matter is decided by a Full Bench.

K. V. Sesha Aiyangar for Petitioner.

A. Swaminatha Aiyar and *S. Thyagaraja Aiyar* for Respondents.

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1. (1933) 64 M.L.J. 605.
2. (1912) 17 C.W.N. 80.
3. A.I.R. 1933 Pat. 445.
4. (1933) 38 C.W.N. 172: A.I.R. 1934 Cal. 477.
5. (1935) 40 C.W.N. 759.
6. (1936) 40 C.W.N. 1334.
7. A.I.R. 1937 Cal. 7.

F.B.

Ayyappa Naicker v. Kasi-perumal Nayakar.

Leach, C.J.

In pursuance of the above Order of Reference, the petition was heard by a Full Bench.

The Court delivered the following

JUDGMENTS. *The Chief Justice.*—This petition raises the question whether a person who has obtained an attachment before judgment is a person whose interests are affected within the meaning of O. 21, r. 90 of the Civil Procedure Code, when the property attached has been sold in execution of a decree obtained by another person. On the 30th November, 1932, the petitioner obtained an order for attachment before judgment in respect of certain immovable property belonging to the second and third respondents and on the 3rd July, 1933, a decree was passed in his favour. Some three weeks before the decree was passed the first respondent caused the attached property to be sold in execution of a decree which he had obtained against the second and third respondents. On the 8th July, 1933, the petitioner filed a petition in the Court which had ordered the sale (the Court of the District Munsif of Tuticorin) asking that the sale should be set aside on the ground that there had been material irregularity. The District Munsif held that the petitioner was not a person who came within the section and dismissed the application. The petitioner appealed to the Subordinate Judge of Tuticorin, who agreed with the District Munsif. The petitioner has now asked this Court to set aside the orders of the lower courts under its revisional powers. It is not disputed that if the lower Courts erred in the interpretation of r. 90 this Court has power to interfere.

R. 90 provides that where any property has been sold in execution of a decree the decree-holder or any person entitled to share in a rateable distribution of assets, or whose interests are affected by the sale, may apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it. S. 311 of the Code of 1882 which is now r. 90 limited the right to apply to the decree-holder or any person whose immovable property had been sold. There has been much judicial discussion on the meaning of the words "whose interests are effected by the sale." Some Judges have expressed the opinion that these words must be taken to refer to a person having a proprietary or possessory title in the property, but the opinion which now prevails is that the words do

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not have this narrow implication and are intended to apply also to a person whose pecuniary interests are affected by the sale.

In *Kathiresan Chettiar* v. *Ramasami Chettiar*[1], a Division Bench of this Court composed of Sadasiva Aiyar and Napier, JJ., held that a decree-holder who had not applied for execution, and therefore, was not entitled to rateable distribution of the proceeds of the sale was not a person whose interests were affected by the sale within the meaning of the rule. They considered that the intention of the Legislature was to confine the word "interests" to an interest in the property sold. As I have indicated, this interpretation is not in accordance with later decisions. The meaning to be given to the words was fully discussed by Srinivasa Aiyangar, J., in *Narayanan* v. *Pappayi*[2]. In that case the Court directed that two items of property which were the subject-matter of a mortgage decree should be sold first and that only afterwards, if the sale proceeds proved insufficient, should another item of property which was covered by the same decree be sold. After the passing of the decree the fourth defendant in the suit purchased the item of property which was to be sold last. He died before the other two items were sold in execution of the decree. After they had been sold his legal representative applied for an order setting aside the sale on the ground of irregularity and fraud. The learned Judge held that the legal representative of the fourth defendant was a person whose interests were affected by the sale. He refused to accept the contention that the expression "whose interests are affected by the sale" should be construed as though it meant that the petitioner must have some interest in the property itself and observed that, when the Legislature intended that the petitioner should have some interest in the property itself it has used apt language. He pointed in this connection to the provisions of O. 21, r. 89, which limits an application under that rule to the judgment-debtor or any person deriving title from him or any person holding an interest in the property. The learned Judge considered that the Legislature intended to confer the right to apply on any one who is directly and immediately affected by the sale and with this opinion I am in entire agreement.

1. (1914) 27 M.L.J. 302. 2. (1927) 53 M.L.J. 229.

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In *Venkatesha Kamthi* v. *Vitla Bhakta*[1], Beasley, C. J. and Bardswell, J., held that a decree-holder who has obtained an attachment before judgment is a person whose interests are affected by the sale. It was there conceded that a person whose pecuniary interests are affected comes within the rule and that the words do not mean proprietary interests only. The case, however, differed from the present one in that the applicant had obtained a decree before the Court sale.

The extent of the interest of a plaintiff in property attached before judgment was discussed by Benson and Wallis, JJ., in *Sankaralinga Reddi* v. *Kandasami Tevan*[2]. In that case the question was whether the plaintiffs had sufficient interest in the property to support an action against persons who had wrongfully removed crops from the land attached and it was held that they had. It was true that the plaintiffs did not, by attaching the crops, acquire any charge on the attached property which would give them priority over other decree-holders applying for rateable distribution or against the general body of creditors proving in an insolvency of the judgment-debtor, but none the less, by virtue of the attachment the plaintiffs acquired a right to have the whole of the attached property applied in satisfaction of their debt if no other creditor came forward, and in any case to have a rateable proportion applied. In this sense the attaching creditor had a charge on the attached property. The right of a plaintiff who attaches before judgment does not go beyond this and there is a long line of cases which shows that he is not a secured creditor in the ordinary sense, but it is clear that he has some interest in the property.

In *Dhirendra Nath Roy* v. *Kamini Kumar Pal*[3], a Division Bench of the Calcutta High Court also held that the expression "whose interests are affected by the sale" is not limited to persons whose proprietary or possessory title is affected by the sale and that an attaching creditor comes within the rule. In *Jogendra Nath Chatterjee* v. *Monmotha Nath Ghose*[4], the Calcutta High Court held that a person who attached before judgment had no present interest in the property and therefore was not within r. 90, but in *Sachai Gopinath* v. *Firm of Kukari Pratap Chandra Saha*[5], another Division Bench of that Court held that

1. (1933) 64 M.L.J. 605. 2. (1907) 17 M.L.J. 334: I.L.R. 30 Mad. 413.
3. (1924) I.L.R. 51 Cal. 495. 4. (1912) 17 C.W.N. 80.
5. (1933) 38 C.W.N. 172.

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a person who has attached before judgment is a person within the purview of r. 90. In the last mentioned case a decree had been obtained by the plaintiff before he made his application and it was on this ground that the earlier case was distinguished.

As I have already indicated in *Sankaralinga Reddi* v. *Kandasami Tevan*[1], this Court held that a person who has attached property before judgment has sufficient interest in the property itself to maintain an action against a trespasser, but it is sufficient to bring him within r. 90 if his pecuniary interests are directly and immediately affected by any irregularity or fraud in connection with the sale proceedings. I hold that a plaintiff who has obtained an attachment before judgment is directly and immediately affected in such circumstances, and therefore is within the rule. The fact that he has not obtained a decree at the time he filed his application does not in my opinion make any difference. If he obtains a decree before making the application his position is, of course, strengthened, but the attachment before judgment is sufficient in itself to bring him within the category of persons whose interests are affected by the sale. In the present case, the petitioner had obtained his decree before he applied and he applied within time. It follows from what I have said that I consider that *Kathiresan Chettiar* v. *Ramasami Chettiar*[2], was wrongly decided and should be overruled.

The decisions of the lower Courts being based on an erroneous view of the law their orders must be set aside with costs here and in the lower appellate Court. The District Munsif will now proceed to dispose of the application in accordance with law.

Wads-worth, J.

Wadsworth, J.:—I agree.

Krishna-swami Aiyangar, J.

Krishnaswami Aiyangar, J.:—I also agree.

S.V.V. —— *Petition allowed.*

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1. (1907) 17 M.L.J. 334: I.L.R. 30 Mad. 413.
2. (1914) 27 M.L.J. 302.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Kadiyala Nagabhushanam and others .. *Appellants** (*Defendants*)

v.

Movva Anandayya and others .. *Respondents* (*Plaintiffs and Defendants*).

Kadiyala Nagabhushanam v. Movva Anandayya.

Hindu Law—Daughters—Claiming as heiresses of their father—Brother claiming right by survivorship—Compromise of conflicting claims—Properties given to daughters to be enjoyed as of right—Nature of estate taken.

A (brother of *B*) claimed properties which were alleged to belong to the joint family, by survivorship and *C* and *D* claimed those properties as daughters of *B* who was alleged to have died as divided member. As a result of a compromise between them, the claims of *C* and *D* were in part recognised and they were given some properties to be enjoyed by them as of right (the terms used being *hakku* and *bhukthom*).

Held, that the compromise should not be treated as a document conveying a gift from *A*. The daughters got an estate similar to that which they claimed, that is, the limited estate of a female.

Nathu Lal v. *Babu Ram*, (1935) L.R. 63 I.A. 155: 43 L.W. 464: 40 C.W.N. 481 (P. C.), distinguished.

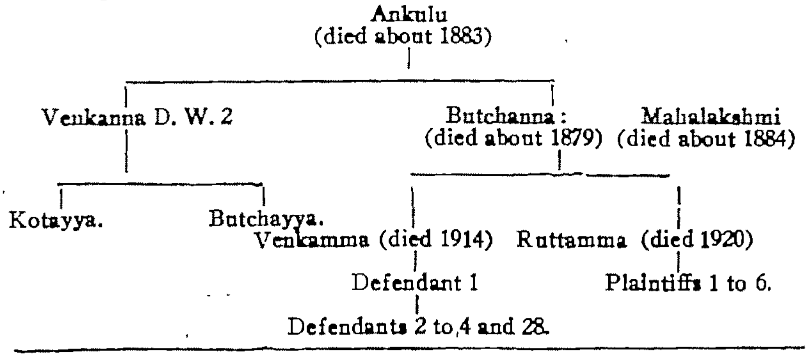
Appeal against the decree of the District Court of Guntur in A. S. No. 49 of 1933 preferred against the decree of the Court of the Subordinate Judge of Bapatla in O. S. No. 129 of 1929.

T. R. Venkatarama Sastri and *V. Suryanarayana* for Appellants.

V. Govindarajachari and *K. Krishnamurthi* for Respondents.

The Court delivered the following

JUDGMENT.—Defendants 1 to 4 and 28 appeal against the decree in a suit brought by the plaintiffs as reversioners of their grandfather Butchanna for 6/7ths of the property held by two deceased ladies, Venkamma the mother of the first defendant and Rattamma the mother of the plaintiffs. The pedigree below will help to elucidate the facts:—



* S. A. No. 852 of 1934. 17th October, 1938.

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In 1892, that is to say, when Ankula Butchanna and his wife were dead, Venkanna filed a suit against his brother's daughters Venkamma and Rattamma impleading also the husband of the former and a relative who was alleged to be interesting himself on their behalf. The plaint Ex. A-4 alleges that there was no partition between Venkanna, his brother, and their father and that he Venkanna had got all the properties by survivorship and that there had been obstruction in the enjoyment of his properties, by the defendants. Before any written statement was filed in the suit there was a compromise Ex. A-2 dated 16th September, 1892, which is the most important document in this case. By that compromise, which was drafted as a partition, the family house was divided. Venkanna was to have one share, defendants 1 and 3, that is, Venkamma and Rattamma, were to have the right (*hakku*) to the other share jointly. All the other properties, movable and immovable, were to be divided, Venkanna was to get 3/5th share of them and Venkamma and Rattamma were to get 2/5th share to be enjoyed by them as of right (the Telugu expression being *hakku bhuktham*). One plot and a well therein were kept in common. Venkamma's husband and the fourth defendant were exonerated. It is important to notice that this compromise is drafted as if it were an ordinary family partition agreement and there is nothing in the language which suggests that Venkanna is making a gift to his nieces.

In 1900, there was a litigation between Venkanna's sons Kotayya and Buchayya on the one hand and his nieces Venkamma and Rattamma on the other. At this time Venkanna was dead. Both the parties appear to have been trying to get behind the compromise. Kotayya and Buchayya were claiming that the whole property should be theirs by survivorship or that at least there should be a re-partition and that they should get two-thirds on the assumption that their father was bound by the compromise into which he had entered. Rattamma who was the plaintiff in the opposite suit, she having been a minor at the time of the compromise, alleged that her father was divided and that the compromise was invalid and so claimed a re-partition of her father's half share in the property. In the result the Court confirmed the compromise as binding on both the parties and dismissed both the suits. The net result is that it is no longer open to Venkanna's sons or grandsons to dispute the compromise.

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The only other important document which has to be mentioned is the partition deed Ex. B dated 5th June, 1905, between Venkamma and Rattamma. The recitals in this partition deed are not really very helpful. It starts by reciting that the father of the two sisters had no sons and that his property passed to them as his heirs; no reference being made to the compromise of 1892. Then it goes on to recite the boundaries of the properties and the division of the shares and it concludes with the recital that each of the daughters is to enjoy her share with powers of alienation. That is to say the document begins with a recital which can only be explained as indicating that they got the property as heirs to their father, which would imply a limited estate, and it ends with a recital of powers of alienation inconsistent with the beginning of the deed. These two recitals are mutually contradictory and the partition deed can best be ignored in considering the nature of the estate which these two ladies took.

The only question to be decided in this appeal is whether by virtue of the compromise of 1892, Venkamma and Rattamma got an absolute estate with rights of alienation or whether they took only a limited estate such as would devolve upon them as daughters of their father. The Courts below have evidently experienced difficulty in dealing with the question whether Butchanna, the father of Venkamma and Rattamma, was divided from his brother Venkanna at the time of his death in or about 1879. Naturally the question of the status of a person who died more than 50 years before the suit is one on which evidence apart from inferences from documents is not likely to be available. The trial Court came to the conclusion that there was probably some attempt at a partition between the two brothers but there is no finding that they were actually divided. The lower appellate Court leaves the matter open and does not discuss the evidence on the point. Both the Courts below came to the conclusion that in the suit of 1892 the claim of Venkamma and Rattamma, which was never formulated in any written statement, was based on a claim to succeed as heirs of their father to his share of the property and they negative the suggestion of the defendants that the claim was really based on the contention of Venkamma's husband that he was an Illatom-son-in-law—which of course he could not have been if his father-in-law died long before he came on the scene. The

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Courts below therefore found that there was no certainty whether Butchanna and Venkanna were in fact divided when the 1892 suit arose, that Venkanna claimed the property by survivorship and Butchanna's daughters resisted that claim on the basis of heirship to their divided father. They found that the compromise was a compromise of these two conflicting claims, Venkanna's claim being partially recognised by giving him a little more than the half share to which he would be entitled had the brothers been divided and the claim of the two ladies being partially recognised by giving them a little less than the estate to which they would have been entitled, had the division between their father and uncle been established. It is held as a consequence that since the compromise partially recognises a claim by heirship, the property which was allotted to the two ladies at the partition must be treated as having been allotted to them in their capacity as heirs and therefore the intention would be that they should get only a limited estate.

The contention put forward by Mr. Venkatarama Sastri for the appellants may be summarised as follows:—There is no finding that Venkanna and Butchanna were divided, nor is there in fact any reliable evidence suggesting a division. With reference to Venkanna's suit, which was compromised before any written statement was filed, there can be no certainty as to the nature of the claim which was put forward on the other side. It is also pointed out that the learned District Judge himself speaks of the possibility that what was given to the two daughters might have been given by Venkanna out of generosity, they being his brother's daughters. It is argued that if once it is conceded that Venkanna made a gift to his brother's daughters, then looking into the terms of the compromise document Ex. A-2, it must also be conceded that the phraseology used with reference to the allotment of the shares to the two ladies is no less ample than that used with reference to the share allotted to the male claimant. The terms *hakku* and *hakku bhuktham* are sufficiently wide in their ordinary meaning to indicate an absolute estate and on the authorities there being nothing to limit the nature of the estate conferred on the two ladies in the document itself it is contended that the inference should be that they got an absolute estate.

I do not think that it is necessary for me to go through the case-law which has been elaborately discussed on the subject of

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the presumptions which arise on documents making a gift to females when there is a doubt whether the estate conferred is an absolute or a limited estate. Mr. Govindarajachari for the respondents concedes that the Privy Council have in the leading cases of *Ramachandra Rao* v. *Ramachandra Rao*[1] and *Shalig Ram* v. *Charanjit Lal*[2] established the rule that when there is a gift expressed in terms of sufficient amplitude to convey an absolute estate, it is not necessary that powers of alienation should be expressed by a separate declaration in definite terms, even though the donee be a woman and notwithstanding a relationship to the donor which might be more consistent with the grant of only a limited estate. It follows that if in the present case we are dealing with a gift by Venkanna to his nieces, the words in which the property is conveyed being sufficiently ample and there being nothing to the contrary in the terms of the document itself, it might be legally permissible to treat this document as conveying an absolute estate to the two ladies.

But in fact are we dealing with a document which conveys or purports to convey a gift from Venkanna to his nieces? I doubt very much whether we are. Although the learned District Judge has used in paragraph 6 of his judgment the phrase which seems to suggest the possibility of a gift out of generosity by Venkanna to his nieces, the definite finding embodied at the end of the previous paragraph is in fact a confirmation of the finding of the trial Court that this compromise was a compromise of a claim in which the two nieces were putting forward their rights to the property as heiresses of their father on the basis that he was divided from his brother. If this be so, and it seems to me that I am bound by these findings of fact, it would follow that Ex. A-2 is not a document of gift by Venkanna to his nieces any more than it is a document of surrender by the nieces to Venkanna. It is a compromise of conflicting claims, Venkanna claiming by survivorship and the daughters claiming by heirship, the result being that each party got something less than that which they claimed. If it was not a case of Venkanna making a gift to his nieces out of generosity but of a compromise whereby each party got something less

1. (1922) 43 M.L.J. 78: L.R. 49 I.A. 129: I.L.R. 45 Mad. 320 (P.C.).
2. (1930) 59 M.L.J. 437: L.R. 57 I.A. 282: I.L.R. 11 Lah. 645 (P.C.).

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than was claimed, it seems to follow that the share allotted to each party, was taken in the capacity in which it was claimed.

Mr. Venkatarama Sastri had relied very strongly on the ruling of the Privy Council in *Nathu Lal* v. *Babu Ram*[1], a case in which the facts bear some similarity to the facts of the present case. That was a case of a dispute between a widow and her husband's alleged coparcener in which the arbitrators awarded a share to the widow, and it was held, though the property was originally claimed by the widow through her husband and though the gift was in settlement of a dispute arising therefrom, that having regard to the fact that the gift to the widow was in the same terms as another gift in the same document to a male claimant, and having regard to the absence of any words limiting the widow's title, she got an absolute estate. With reference to this case it has to be remembered that before the arbitrators the widow had made an admission that her husband and her brother-in-law were undivided; and she had definitely asked that some portion of the property should be allotted to her absolutely. These circumstances were such as to give room for an inference that at the time when the arbitrators allotted the property to the widow, the intention was to give her an absolute estate and not a widow's estate to which she had originally laid claim. I do not think that this case is authority for holding that when a female puts forward a claim consistent only with the claim to a limited estate and that claim is in part recognised by a compromise, the estate which would be conveyed by the compromise would in the absence of anything to the contrary be presumed to be anything else than an estate similar to that which was claimed. Mr. Govindarajachari has relied on a series of cases arising out of the same transaction reported in *Rani Mewa Kuwar* v. *Rani Hulas Kuwar*[2], *Khunni Lal* v. *Gobind Krishna Narain*[3], *Karim-ud-din* v. *Gobind Krishna Narain*[4] and also upon *Sreemutty Babutty Dossee* v. *Sibchunder Mullick*[5]. The general result of decisions such as these is that when a person puts forward a claim based on a pre-existing estate and that claim is to some extent recognised by a com-

1. (1935) L.R. 63 I.A. 155: 43 L.W. 464: 40 C.W.N. 481 (P.C.).
2. (1874) L.R. 1 I.A. 157 (P.C.).
3. (1911) 21 M.L.J. 645: L.R. 38 I.A. 87: I.L.R. 33 All 356 (P.C.).
4. (1909) 19 M.L.J. 687: L.R. 36 I.A. 138: I.L.R. 31 All 497 (P.C.).
5. (1854) 6 M.I.A. 1.

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promise that compromise will be interpreted in the light of the claim which was put forward and the estate which will pass will be an estate similar to that which was claimed. It seems to me, applying these principles to the facts of the present case, that when once it is found as it has been found by the Courts below—with, in my opinion, considerable justification—that Venkamma and Rattamma were claiming rights as devolving upon them from their father in what was alleged to be his separate estate and in the compromise those rights were to some extent recognised, the natural inference is that they got an estate similar to that which they claimed, that is to say, the limited estate of a daughter.

It therefore follows that Venkamma and Rattamma were by virtue of the terms of compromise Ex. A-2 limited owners and that the plaintiffs as reversioners to the father of Venkamma and Rattamma are on their death entitled to claim their due share in the reversion. The appeal is therefore dismissed with costs.

Leave refused.

K. C. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE MADHAVAN NAIR.

Rai Sahib C. N. Maduranayakam Pillai .. *Appellant** (*Plaintiff*)

v.

The Secretary of State for India in Council .. *Respondent* (*Defendant*).

Maduranayakam Pillai v. Secretary of State for India in Council.

Water—Irrigation source—Tankbed area—Person holding lands in old ayacut—Right to use of water—Modification by Government—Limits of power.

In the Madras Presidency the ryot is entitled to receive the water which his lands have been accustomed to for irrigation purposes without interference by the Government or anyone else. The Government cannot be required to supply water when none is available and it has a right of conserving and distributing the water available in the interests of the particular ayacut, and in years of shortage the only obligation of the Government is to make an equitable distribution of water. But the ryot has a claim against the Government when it withholds from him the water which he has a right to demand taking into consideration the supply available.

Held, that a ryot holding lands under the old ayacut in a tankbed area can successfully sue the Secretary of State for a declaration that he was entitled to a sufficient supply of water for the cultivation of one crop per annum subject

* O. S. A. No. 71 of 1936. 7th November, 1938.

to the power of the Government to control the distribution of the available water in the interests of the landholders whose lands comprise the old ayacut. Madura-nayakam Pillai *v.* Secretary of State for India in Council.

Case-law reviewed.

On appeal from the judgment of the Hon'ble Mr. Justice Wadsworth dated 15th September, 1936 and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C. S. No. 371 of 1929.

T. R. Venkatarama Sastri, Srinivasaraghavan and *Thyagarajan* for Appellant.

The Advocate-General (*Sir A. Krishnaswami Aiyar*) instructed by *The Government Solicitor* for Respondent.

The judgment of the Court was delivered by

The Chief Justice.—This appeal raises a question of great public importance. The Court is called upon to decide what are the powers of the Government with regard to the distribution of water in two reservoirs, or tanks as they are usually called in India from which the city of Madras receives its water-supply. One tank is known as the Cholavaram tank, and the other as the Red Hills tank. They lie close to one another, some fifteen miles from the city of Madras. Before 1870 when the Government undertook a scheme to increase the storage capacity of these tanks with the primary object of supplying water to Madras, the water in the tanks was used merely for the purpose of irrigating lands in the vicinity. Near to the tanks in the river Cortelliar, but before the scheme was carried out there was no connection between the river and the tanks and the level of the water in them depended on the rain which fell in the catchment area. The evidence, however, discloses that the water in the Red Hills tank was sufficient in a normal year for the cultivation of one crop at least in an ayacut of over 5,000 acres. The scheme provided for the damming of the Cortelliar river, the diversion of water impounded by this dam into a channel in the Cholavaram tank and the construction of another channel connecting the Cholavaram tank with the Red Hills tank. The scheme was a costly one, but as it contemplated the storage of sufficient water to bring under cultivation a further area, as well as supplying the old ayacut and Madras, the Government anticipated meeting the cost out of the increase in land revenue which would follow from an extension of the irrigated area. The scheme was completed in 1872 and an additional area was brought under cultivation as the result of the increased water-supply. The Government has, however, always regarded the Leach, C.J.

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scheme as being in the first instance for the benefit of Madras, and the question which falls for decision is whether the Government is entitled to supply Madras with water without regard to the rights of the cultivators in the old ayacut as they existed in 1870.

The suit out of which the appeal arises was filed on the Original Side of this Court by the appellant against the Secretary of State for India in Council. The appellant is the owner of some 43·44 acres of lands in the old ayacut. The fact that the lands fell within the old ayacut was denied, but it was held that they did and this finding has not been challenged before us. The appellant asserted that he was entitled to have sufficient water each year for the cultivation of two crops on his lands and this without regard to the needs of Madras. He complained that in faslis 1336 and 1337 (1926-27 and 1927-28) the crops on his lands were damaged as the result of the Government withholding from him the water to which he was entitled. He assessed the total damage at Rs. 5,523-7-6 and asked for a decree for this amount. He also asked for a declaration of his rights. In the written statement filed on behalf of the Secretary of State it was denied that the appellant had the right to be supplied with any definite quantity of water or to claim damages on the ground that water had been withheld from him. It was said that the Government had an absolute right to regulate the distribution of water or to withhold it both with regard to the lands in the old ayacut and those brought under cultivation subsequent to the carrying out of the scheme. It was also said that as the primary object of the scheme was to provide a water-supply for Madras any rights which the appellant had before the scheme came into operation had been put an end to by the project, the ryots having taken the risk of the water-supply being restricted in return for the benefit to be derived from the scheme. The respondent put the appellant to strict proof that certain of his lands were "wet" lands pertaining to the old ayacut and denied that he was in any event entitled to water for the cultivation of a second crop. The case was tried by Wadsworth, J., who held that the appellant was entitled to sufficient water for the cultivation of one wet crop a year on his lands, but subject to the power of the Government to control the distribution of water with reference to (1) the need for conserving water in the interests of the whole ayacut, and (2)

the need for economising water in seasons or months of shortage in order that a perennial supply might be available in the tank for the use of the municipality. On this basis the claim for damages was dismissed.

With regard to the nature of the appellant's lands the respondent has contended that 38·87 acres out of the total area of 43·44 acres are not really wet lands, that is lands which are entitled to the supply of water for cultivation purposes. It is said that they are "wet waste lands" and as such have no right to water from the channels under the control of the Government. This contention is based on a deed of conveyance dated 7th August, 1866, in which the lands are described as being "wet waste lands". Before us the learned Advocate-General has conceded that the 38·87 acres must be classified either as wet lands or as dry lands, there being no intermediate classification. We consider that all the lands must be classified as wet lands. They were so classified in the settlement of 1875 and have since been so classified. The paimash accounts of 1840 which would have shown the classification in that year were destroyed by an order of the Government dated 26th March, 1938 and cannot be referred to, but there is no reason to believe that the classification then was different. On the question whether before the scheme the appellant's lands carried with them the right to sufficient water for the cultivation of two crops the learned trial Judge held that the evidence established that except in years of unusual small rainfall the lands on the ayacut received a regular supply of water for the irrigation of the first crop and a somewhat precarious supply of water for a second crop over a portion of the area. In the minutes of the proceedings of the Madras Government, Public Works Department, dated the 26th April, 1870, it is stated that the Red Hills tank as it stood before the scheme was carried out would probably suffice for the whole area for the first crop and for a good deal of second crop cultivation. In subsequent official reports reference is made to the fact that lands in the old ayacut were well irrigated before the scheme, but there is no statement to be found which indicates a right to water for a second crop. We concur in the finding of the learned Judge and hold that before the scheme was carried into effect the appellant's lands were in a normal year entitled to receive from the Red Hills tank sufficient water for the cultivation of one crop.

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In carrying out the scheme the Engineers placed the level of the Municipal sluice at 31·31 feet above mean sea level, but in order to avoid pumping and allow water to reach Madras by gravitation it was necessary to have at least six feet of water always stored in excess of requirements. In 1892 the Chief Engineer for irrigation pointed out that the supply by gravitation to Madras could not be well assured till the level was plus 38, and on his recommendation the Government directed that this level should be maintained. In 1908 it was ordered that there should be a complete stoppage of the issue of water for irrigation purposes during the months of July and August, even if the level was in excess of plus 38. In the year 1926 the rainfall was below normal and on the 30th November, 1927, the Government ordered that no water should be withdrawn for irrigation from either tank till the level of the water in the Red Hills tank had reached plus 44·67, which meant a full tank. On the 22nd August, 1928, the rules for the issue of water were again changed. It was then ordered that so long as the level of water in the tank was at plus 38, or lower, no water would be issued for irrigation. If the level rose above plus 38, water would be issued for irrigation from 1st September to 14th October (inclusive), but the supply was liable to be cut off, if in the meantime the water level in the tank fell to plus 38. During the north-east monsoon, the issue of water for irrigation would be stopped from the 15th October and would not be resumed till the 15th December or until the full tank level (plus 44·67) was reached, whichever date was later. After the 15th December the issue of water would be continued till the 31st January, if in the meantime the level did not fall to plus 38, but if it did fall to that level the issue would be stopped. In pursuance of the policy of safeguarding the supply of water to Madras the supply to the appellant was cut off altogether in the year 1926-27 and in 1927-28 no water was supplied to him in the months of August, September, October, and November. In these years the water in the Red Hills tank was far in excess of what it was when the project was undertaken and no attempt has been made by the learned Advocate-General to show that the rainfall in 1926 was so small that the appellant would not have received sufficient water for the cultivation of one crop if the Red Hills tank had not been improved, but had remained as it was in 1870. and it must be taken, at any rate so far as the

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year 1926-27 is concerned, that the appellant's rights, assuming them to be the same as they were in 1870, were disregarded.

This brings me to the question whether the appellant's rights have undergone a change by reason of the scheme and the answer entails an examination of the authorities. I may say at once that the contention that the ryots in the old ayacut undertook a risk and that for benefits to be derived from the scheme they surrendered their rights cannot be sustained. So far as the Court is aware the ryots were not even consulted with regard to the scheme, and far from surrendering their rights they have from time to time protested against the preference given to Madras.

In *Kristna Ayyan* v. *Vencatachella Mudali*[1], it was held that the Government had an undoubted right to distribute the water of Government channels, but that power did not include the power to disturb existing arrangements to the prejudice of any tenant during the continuance of the tenancy, and this decision was quoted with approval in *Ramachandra Aiyar* v. *Narayanasami*[2], which was a suit between ryots holding lands under the Government in which the Collector was joined as a defendant. With the sanction of the Collector the first defendant had opened a new irrigation channel, thereby diminishing the supply of water necessary for the cultivation of the plaintiff's land. The trial Court held that the Collector's order was in excess of his powers and issued an injunction directing the channel to be closed. The plaintiff was also granted a decree for damages. This decision was upheld on appeal. In *Sankaravadivelu Pillai* v. *Secretary of State for India in Council*[3], White, C.J., as the result of the decisions in *Kristna Ayyan* v. *Vencatachella Mudali*[1] and *Ramachandra Aiyar* v. *Narayanasami*[2], considered it to be settled law that the Government had the right to distribute the water of Government channels for the benefit of the public subject to the right of a ryotwari landholder, to whom water had been supplied by the Government to continue to receive such supply as would be sufficient for his accustomed requirements. The question was again considered by White, C.J., sitting with Pinhey, J., in *Robert Fischer* v. *Secretary of State for India in Council through the Collector of Madura*[4], which

1. (1872) 7 M.H.C.R. 60. 2. (1892) 2 M.L.J. 279: I.L.R. 16 Mad. 333.
3. (1904) 15 M.L.J. 32: I.L.R. 28 Mad. 72.
4. (1908) 19 M.L.J. 131: I.L.R. 32 Mad. 141.

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concerned the rights of riparian owners. It was held that the Government had power, by the customary law of India, to regulate in the public interests, in connection with the collection, retention and distribution of waters of rivers and streams flowing in natural channels, and of waters introduced into such rivers by means of works constructed at the public expense, and in the public interests, for purposes of irrigation, provided that they did not thereby inflict sensible injury on other riparian owners and diminish the supply they had hitherto utilized. The decision in *Robert Fischer* v. *Secretary of State for India in Council through the Collector of Madura,*[1] was referred to in the judgment of the Privy Council in *Kandukuri Bala-surya Prasadha Row* v. *Secretary of State for India in Council*[2]. and with the apparent approval as their Lordships observed that the law of the Madras Presidency as to rivers and streams was certainly different in some respects from the English law.

In *Malyam Patel Basavana Gowd* v. *Lakka Narayana Reddi*[3], Wallace and Krishnan Pandalai, JJ., were called upon to state the legal position where the ryots of wet lands in two Government ryotwari villages, situated on opposite sides of a Government river drew water for irrigation from channels under the control of the Government which were taken off at particular points in the river bed, and the ryots of one village moved the head of one of the channels to the detriment of the ryots of the other village. The Court held that a ryot of ryotwari village acquired a legal right to the water when it reached his customary channel for the irrigation of his lands, and not merely when the water had reached his fields. It was open to the Government to alter at any time the manner and method by which it supplied the necessary water to a ryot, but by undertaking the obligation to supply him with water the Government also undertook that it should be at his disposal by the usual and customary method, that is, by a channel constructed either by the Government or by the ryot or both, until and unless some other method was adopted. The ryot could not insist as against the Government that he had any right to have

1. (1908) 19 M.L.J. 131: I.L.R. 32 Mad. 141.
2. (1917) 33 M.L.J. 144: L.R. 44 I.A. 166; I.L.R. 40 Mad. 886 (P.C.).
3. (1930) 61 M.L.J. 563: I.L.R. 54 Mad. 793.

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his supply carried by any particular channel and could not object to the Government altering the channel of supply, but he had a right as against other ryots and even, subject to the Government's right to give him an equally efficient supply, as against the Government to the protection of law for that supply once it had passed into the channel earmarked for his supply. If the customary supply and manner of supply according to the contractual or proprietary right were interfered with by private parties such interference was an invasion of the ryot's rights and would give rise to a cause of action. The most recent decision by a bench of this Court is that given in the case of the *Secretary of State for India in Council* v. *Nageswara Aiyar*[1]. This appeal was heard by Varadachariar and Mockett, JJ., who accepted as correct the statement of the law in *Sankaravadivelu Pillai* v. *Secretary of State for India in Council*[2]. They pointed out that the rights and obligations as between the State and the ryot in this country so far as supplying water for irrigation purposes was concerned rested largely on unrecorded custom and practice. The ryotwari holder was ordinarily spoken of as entitled to the customary supply of water, but the obligation of the Government was not to find the required supply of water, but only not to interfere with the necessary supply if and so far as water was available.

The effect of these decisions is that in the Madras Presidency the ryot is entitled to receive the water which his lands have been accustomed to for irrigation purposes without interference by the Government or any one else. The Government cannot be required to supply water when none is available and it has a right of conserving and distributing the water available in the interests of the particular ayacut. In years of shortage the only obligation of the Government is to make an equitable distribution of water. The ryot has a claim against the Government when it withholds from him the water which he has a right to demand taking into consideration the supply available. In the face of the authorities the plea advanced on behalf of the Government that it has the right in law to supply Madras with water without regard to the claims of the ryots in the old ayacut cannot be accepted. It is, of course,

1. (1936) 71 M.L.J. 268.
2. (1904) 15 M.L.J. 32: I.L.R. 28 Mad. 72.

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manifest that the needs of the City of Madras are of very great importance and in the absence of rights in others no one could reasonably complain of the policy of the Government in giving this large city a preference in the supply of water, but when others have acquired rights the law requires that they shall be respected. It follows that in our opinion the declaration granted to the appellant does not do justice to the appellant. The Government is not entitled to economise water in seasons or months of shortage in order that a perennial supply may be available for the use of Madras if this economy means that the ryots in the old ayacut will have their customary supply diminished. The appellant will have a declaration that he is entitled to sufficient water for the cultivation of one crop per annum without reference to the needs of the city of Madras, subject to the power of the Government to control the distribution of available water in the interests of the landholders whose lands comprise the old ayacut. This declaration is not to be deemed to confer on the appellant greater rights than those which existed in 1870 or to diminish the powers of Government with regard to the distribution of the supply.

The position of the ryots in the area which has been brought under wet cultivation since the inauguration of the scheme does not call for discussion in this case. The ryots in the new area are in a different position to the ryots in the old area, and it may very well be that their rights to water are subject to the requirements of the City of Madras.

It is clear that as the result of the Government cutting off the supply of water for irrigation purposes altogether during 1926-27 the appellant suffered damage, and it is agreed that the damages shall be assessed at Rs. 450. No loss has been proved in respect of the following year and the claim for damages in respect of that year will be dismissed.

The result of the appeal is the appellant will have a declaration in the terms indicated in this judgment and a decree for damages in the sum of Rs. 450. As the appellant has succeeded on the main point he will be awarded costs here and below.

B.V.V. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Appellate Jurisdiction.]

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE MADHAVAN NAIR.

Tenneti Viswanadham .. *Appellant** (*Debenture-holder*)

v.

M. S. Menon, Official Liquidator of the Swarajya Printing and Publishing Company, Limited, and another .. *Respondents* (*Applicant and Petitioner*).

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Transfer of Property Act (VI of 1882), Amendment Act (XX of 1929), Ss. 4, 59 and 100—Debenture loans secured by immovable property—Registration necessary if debenture-holders were to rank as secured creditors—Registration Act (XVI of 1908), S. 17—S. 59 of the Transfer of Property Act to be read supplemental to the provision of Registration Act.

By the amendment (Act XX of 1929) to the provi[illegible] Transfer of Property Act, all the provisions which precede S. 100 have been applicable 'so far as may be' to a charge. The words 'so far as may be' have not the effect of taking S. 59 out of the purview of S. 100. S. 100 applies all the provisions of the Act with regard to a simple mortgage to a charge, unless a particular provision is incompatible with a charge. S. 17 of the Registration Act requires a charge, if for Rs. 100 or upwards, to be registered, and by virtue of S. 4 of the Transfer of Property Act, S. 59 has now to be read as being supplemental to S. 17 of the Registration Act.

Where a company issued debentures of Rs. 50 each and each debenture certificate contained the words that the loan was to be secured by a specified immovable property belonging to the company, and the company went into liquidation, on the question whether the holders of the debentures were entitled to rank as secured creditors,

Held, that even if only a charge instead of a mortgage had been created thereby, registration was necessary. Therefore the debentures in question were invalid by reason of non-registration.

Kuppuswami v. *Rasappa Chettiar*, (1936) 44 L.W. 438, distinguished.

On appeal from the judgment of the Hon'ble Mr. Justice Gentle dated 3rd December, 1937 and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Application No. 2297 of 1937 in O. P. No. 208 of 1936.†

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*O. S. A. No. 3 of 1938. 18th October, 1938.

O. P. No. 208 of 1936.

†The judgment of the Court was delivered by

Gentle, J.—The matter requiring decision to-day in this winding up is as to the nature and effect of debentures issued by the company. In 1935 there was issued a large umber of debentures for the total sum of Rs. 30,000 to Rs. 40,000 taken up by about 200 individuals. Each debenture is in respect of

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D. Suryaprakasa Rao for Appellant.

K. S. Narayana Aiyangar, S. Parthasarathy and *V. K. Thiruvenkatachari* for Respondents.

The judgment of the Court was delivered by

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The Chief Justice.—By a resolution dated the 7th July, 1935, the Swarajya Printing and Publishing Company, Limited,

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a sum of Rs. 50. It is contended on the one hand that each debenture has merely the benefit of a charge upon immovable property belonging to the company out of which the debt should be discharged. On the other hand it is contended that each debenture is a mortgage and although registered pursuant to S. 109 of the Companies Act no registration of any of these debentures has taken place pursuant to S. 17 of the Registration Act, and S. 59 of the Transfer of Property Act and consequently the debentures are invalid or of no legal effect and give the holders thereof no rights as secured creditors in the assets of the company.

The debentures purport to be issued under the authority of a resolution of the Board of Directors of the company in the resolution dated 7th July, 1935 This is as follows:—"Resolved that a debenture loan of Rs. 50,000 on the security of the site and the buildings of the Swarajya, Patters Gardens, Mount Road P.O., Madras, be raised each debenture bond is to be of the value of Rs. 50 only, carrying interest at 5 per cent. per annum redeemable by the 1st of January, 1941, interest being payable annually, the first payment to be made on 1st January, 1937". On the front page of each debenture one finds that there is acknowledged payment to the credit of the company of Rs. 50 by way of loan to the said company upon the security and subject to the conditions mentioned overleaf. There are ten conditions in all, five of which have relevance to the matter before me.

"*Condition 1.*—Interest on the said sum shall be payable at the Swarajya Buildings at Madras at the rate of 5 per cent. per annum by yearly payment on the 1st January of each year, the first of such payments to be made on the 1st January, 1937 and to be calculated from the date of the debenture.

"*Condition 2.*—The said sum of Rs. 50 shall become due and payable on the 1st January, 1941 or earlier on the death of the holder thereof to his nominee or heirs, executors or administrators.

"*Condition 3.*—The debenture is entitled to the benefit of the charge created on the immovable properties specified in the schedule by way of security for the repayment of the said sum of Rs. 50 and interest thereon.

"*Condition 5.*—This company shall be entitled to redeem on the 1st July each year any number of debentures which it may think fit to do, notwithstanding other provisions in the conditions upon complying with the machinery set out in the condition.

"*Condition 9.*—Nothing contained in the condition should render officers of the company or the members of the Board of Directors or any of them personally liable to the holder of the debenture for the sum of Rs. 50 or any part thereof, any interest thereon or oblige the said officers or members to pay the sum hereby secured except out of the properties of the company for the time being vested in them.

"*Condition 10.*—Any arrear due to the company by the holder of the debenture should, notwithstanding anything herein contained, be deducted

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Madras, a company incorporated under the Indian Companies Act, 1913, resolved to issue 1,000 debentures of Rs. 50 each and 922 of these debentures were issued. There was no debenture trust deed, but on each certificate the conditions of issue were printed and the loan was stated to be on the security of specified immovable property. The debentures were registered with the Registrar of Joint Stock Companies pursuant to S. 108 of the Indian Companies Act, but they were not registered under the Indian Registration Act. The company is now in liquidation,

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before the payment of the debenture to the holder or to his nominee and the company may set off the whole or part of the interest due to any debenture-holder against amounts owed by the holder to the company."

The schedule contains a description of the immovable property which is referred to in condition 3. The debenture itself does not expressly create a charge. The language of condition 3 is similar to that which one finds in debentures where there has been a mortgage executed in favour of a trustee for debenture-holders. No mortgage in favour of debenture-holders has been entered into in respect of these debentures. One has to give a meaning to words which are used in documents and expressions which are made. The wording of the resolution of 7th July, 1935, to which I have referred to does not record the creation of a charge in those words, it is a resolution that a loan of Rs. 50,000 shall be obtained on the security of the property which is set out in the schedule to the debenture. Printed upon each debenture is a certificate of registration of particulars of a series of debentures pursuant to S. 114 of the Indian Companies Act which certificate itself does refer to a charge created by the company by the resolution. There is no doubt the intention was, whether it be this debenture is a mortgage or it merely gives a charge and a charge only upon the immovable property of the company, that the holders should have some rights in respect of those properties. It was contended by the learned counsel who appeared for s[illegible]. the debenture-holders that such debenture-holder had the right of having his loan repaid out of the proceeds of the properties charged, had no personal rights against the company and the property itself alone was under the provisions of the debenture the source from which money should be obtained to discharge the debenture liability. Then it provides for payment of interest on the 1st January of each year or from 1937. The learned counsel conceded that that would be a debt payable by the company, in respect of interest each year would have to be paid, and the company would have to pay it. If this company had not gone into liquidation but had continued to carry on business and the interest had not been paid, the debenture-holders then, it would appear to be conceded, have a right against the company itself for payment of that interest. So far as interest is concerned there is no dispute that there is a personal obligation. In regard to condition 2 it was argued that that created no personal obligation. This condition provides that the sum of Rs. 50 shall become due and payable upon the happening of the events mentioned. The words "due and payable," it was contended, meant and mean the date when the debenture becomes realisable. It does not mean, it was suggested, that the company should pay the sum of Rs. 50 upon the happening of the events mentioned in the condition. One gives to ordinary words their ordinary

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and the question is whether the holders of these debentures are entitled to rank as secured creditors. The question was considered by Gentle, J., on an application by the Official Liquidator, who is the first respondent in this appeal. The Official Liquidator contended that the debentures were invalid for two reasons. In the first place, he said that the wording of the debentures operated to create a mortgage and not merely a charge and therefore by reason of S. 59 of the Transfer of Property Act, registration was compulsory. The second reason was that even

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meaning and nothing to my mind can be clearer in its meaning than the words "become due and payable". 'Payable' can only mean 'pay' and since the loan is to the company, the company in this condition is agreeing to pay the principal when it becomes due. In regard to condition 3 whereby it is stated that the debenture is entitled to the benefit of the charge created and it goes on to say 'by way of security for the repayment of the said sum of Rs. 50 and interest thereon'; the 'repayment' to my mind means payment by the company to the lender of monies lent under the debenture and it cannot mean anything esle. If the loan on the debenture was to be satisfied out of the properties contained in the schedule, the word 'repayment' in condition 3 would not have appeared. Again the benefit of the charge by way of security for repayment to my mind indicates and indicates only that in regard to the sum which the company was to pay and which is a separate obligation, to secure that repayment by the company there is the property of the company available in the same way as in an ordinary mortgage there is a covenant to repay and the property under mortgage is security to the mortgagee for repayment by the mortgagor. Condition 9, as was pointed out, is one which refers to officers and members of the board of the company and is inserted for their protection. With that I entirely agree but from the last few words of that condition one finds that although those officers and members of the board are not to have any personal responsibility in respect of the loan given upon the debenture, nevertheless in respect of the properties of the company vested in them the debenture-holder can look for repayment or satisfaction of monies due to him under the debenture. The words are "properties of the company" which must mean all the properties and not only those in the schedule but all other assets which for some reason or other may be vested in a member of the board or an officer. To my mind those words assist in ascertaining whether under the earlier conditions there is a personal covenant by the company to repay. Of course if all the properties of the company which may be vested in specified individuals are to be the subject of liquidation of these debentures, then it must follow that these properties which are not vested in officers or members also must be the source from which monies could be obtained to repay these debentures. When there is a personal covenant to repay as there is in a mortgage, the mortgagor may seek payment from the properties other than those which are secured in the mortgage, to satisfy the claims of the mortgagee. In my view it is quite clear that there is a personal covenant to be implied from the conditions by the company to repay the debenture debt. It was also contended that this debenture does not contain any transfer of an interest in property. Transfer of a right in property need not be express, it may be implied and if a right of sale is given at the outset in a mortgage as it is alleged these debentures are,

if there was a mere charge and not a mortgage, S. 100 of the Act still made registration necessary, The learned Judge accepted the contention that a mortgage had been created and he consequently held that the debentures were invalid. In the circumstances it was not necessary for the learned Judge to consider the second point. The debenture-holders have appealed.

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though not expressly so but by implication, if there is a right of sale there is a transfer of the right in property. When one finds that in condition the debenture-holder is entitled to the benefit of the charge created on immovable property specified in the schedule by way of security for the repayment of the principal and interest, in my view from that there is an implication that a transfer of a right or an interest in property was then given. If the interest fell into arrear and was not paid, since the property is charged by way of security for payment of the interest, the debenture-holder could take proceedings to realise the property to satisfy the interest.

The distinction between a charge and a simple mortgage as has been pointed out in several cases is very fine sometimes. In order to ascertain the position it is necessary to refer to two sections of the Transfer of Property Act. The relevant part of S. 100 is as follows:—"Where immovable property of one person is by act of parties or by operation of law made security for the payment of money to another and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property and all provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to such charge" S. 58 (*a*) is as follows:—"A mortgage is the transfer of an Interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt or the performance of an engagement which may give rise to a pecuniary liability."

It is necessary to have before one the incidents or essentials of a mortgage. They are (1) that it must be created by act of parties; (2) it must be for a debt; (3) it must be of specific property; and (4) it must involve a covenant to repay. When those four essentials are found, then the transaction is one of mortgage. There are two other features which are not essentials but are sometimes present, namely, (1) a formal transfer of the interest and (2) express power of sale. In *Subbaraya Pillai* v. *Pichaipillai Udayan*, A.I R. 1937 Mad. 148, King, J., at page 149 in the course of his judgment points out that when the four essentials I have mentioned are present the transaction is a mortgage In *Balasubramania Nadar* v. *Sivaguru Asari*, (1909) 21 M.L.J. 562, Sir Arnold White, C.J., in the course of his judgment at p. 569 says this: "I think a covenant to pay is an essential element of a simple mortgage. It has been held that it is not necessary that there should be a formal transfer of an interest in property in words and I think the authority of the Privy Council decision, *Sri Raja Papamma Rao* v. *Sri Vira Pratapa*, (1896) 6 M L.J. 53: L.R. 23 I.A. 32: I.L.R. 19 Mad. 249 (P.C.), goes so far as this Then it is also not necessary to constitute a simple mortgage that the instrument should state that the mortgagee shall recover his money by sale of the mortgaged property." It is interesting to note that at p. 562 in the headnote of this decision the following appears. The mortgage deed ran as follows:—"In default I shall on the security of

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We agree that the debentures are invalid for want of registration, but we prefer to base our decision on the provisions of S. 100 of the Transfer of Property Act read with S. 59. We do not suggest that the case was not rightly decided on the first point taken by the Official Liquidator, but the question is not free from difficulty and it seems to us that by reason of the sections, I have just mentioned, registration was necessary even if only a charge was created.

S. 59 of the Transfer of Property Act admittedly requires a simple mortgage to be registered, even when the mortgage-debt is less than Rs. 50. The section reads as follows:—

"Where the principal money secured is one hundred rupees or upwards a mortgage other than a mortgage by deposit of title-deeds can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses.

Where the principal money secured is less than one hundred rupees, a mortgage may be effected either by a registered instrument signed and attested as aforesaid, or (except in the case of a simple mortgage) by delivery of the property."

As a simple mortgage cannot be effected by delivery of the property it can only be effected by a registered instrument, and

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the house site belonging to me pay and make good the principal and interest." In substance that is what the effect of the conditions of this debenture express. In the authority which I have just cited it was held that the document was a mortgage. In *Rama Brahmam* v. *Venkatanarasu Pantulu*, (1912) 23 M.L.J. 131, the headnote is to the effect that a formal transfer of interest and an express power of sale are not essential elements of a mortgage. The covenant to pay is an essential element of a simple mortgage. A charge created by act of parties on specific immovable property for a debt and containing a covenant to pay is a mortgage within the meaning of S. 31 of the Limitation Act. The headnote is borne out by the judgment of Ayling, J., at pp. 133 and 134. In *Chhaganlal Sakharam* v. *Chunilal Jagmal*, A.I.R. 1934 Bom. 189, Tyabji, J., at p. 191 says: "If the transaction is exactly of the nature contemplated by the law which the law describes or otherwise refers to as a mortgage and if it has the same incidents so that it cannot be distinguished from a mortgage, the transaction cannot be treated otherwise than as a mortgage merely by calling it a charge." From these authorities provided the four elements which I mentioned are present, then the transaction becomes a mortgage.

In the present instance the debenture came into existence and was created by act of parties. Secondly, it is in respect of a debt, a loan of Rs. 50. Thirdly, the charge is created over specific immovable property specified in detail in the schedule at the foot of the conditions at the back of the mortgage. Fourthly, there is in my view a covenant by the company to repay. I have dealt with this covenant above and I am satisfied it exists. It follows therefore that each of these debentures is a mortgage.

S. 4 of the Transfer of Property Act directs that S. 59 shall be read as supplemental to the Registration Act. The first clause of S. 100 as amended by Act XX of 1929 provides:—

"Where immovable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all the provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to such charge."

Before the amendment this clause read as follows:—

"Where immovable property of one person is by act of parties or operation of law, made security for the payment of money to another and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all the provisions hereinbefore contained as to a mortgagor shall, so far as may be, apply to the owner of such property, and the provisions of Ss. 81 and 82 shall, so far as may be, apply to the person having such charge."

By the amendment all the provisions of the Transfer of Property Act which precede S. 100 have been applicable "so far as may be" to a charge. Therefore unless the words "so far as may be" operate to sever S. 59 from S. 100, registration of a charge is necessary. We do not consider that these words have the effect of taking S. 59 out of the purview of S. 100. S. 100 applies all the provisions of the Act with regard to a simple mortgage to a charge, unless a particular provision is incompatible with a charge. Registration is surely not incom-

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An argument was addressed to me regarding the necessity or otherwise for the registration of a bare charge but in the light of the view to which I have come it is unnecessary for me to deal with that argument. I said earlier that learned Counsel who appeared on behalf of some of the debenture-holders informed me that he was not contending that if this document amounted to a mortgage registration was unnecessary. Reference has been made to the provisions of S. 5 of the Transfer of Property Act regarding the provisions of the Act as affecting the companies. I am told there is a decision of a bench of the Calcutta High Court to the effect that companies are subject to the provisions of the Transfer of Property Act and for that reason the learned Counsel told me that he did not propose to argue contrary to that position before me. I mention this fact if it becomes necessary to have a record of it hereafter.

Having come to the conclusion that each debenture issued by the company in 1935 was a mortgage and as each mortgage has not been registered pursuant to the Acts applicable, it follows therefore that each of these debentures is invalid and unenforceable in law as a mortgage and that the holder of each debenture is not a secured creditor of the company in liquidation and I direct the Official Liquidator to act in accordance with the view I have expressed above.

In my view each debenture is a simple mortgage within the definition of S. 58 (*b*) of the Transfer of Property Act.

Tenneti Viswanadham v. M. S. Menon.

Leach, C.J.

patible. S. 17 of the Registration Act requires a charge if for Rs. 100 or upwards to be registered, and by virtue of S. 4 of the Transfer of Property Act S. 59 has now to be read as being supplemental to S. 17 of the Registration Act. If the words in S. 100 of the Transfer of Property Act are to be given their plain and ordinary meaning we are of the opinion that S. 59 cannot be excluded. In the course of the arguments our attention was drawn to the decision of Varadachariar and Mockett, JJ., in *Kuppuswami* v. *Rasappa Chettiar*[1]. The learned Judges there were considering whether there could be an oral charge and the case was one which was instituted before the amendment of the Transfer of Property Act in 1929. The learned Judges were not considering the question now before us and their decision has no application here.

For the reasons indicated we hold the debentures in question are invalid by reason of non-registration, and the appeal must be dismissed with taxed costs in favour of the Official Liquidator.

K.C. —— *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Rangoon.]

PRESENT:—LORD ROMER, SIR SHADI LAL AND SIR GEORGE RANKIN.

Sooniram Ramniranjandass .. *Appellant**

v.

Alagu Nachiyar Koil (Temple) otherwise known as Alagiya Nachi Amman Koil by its Trustees .. *Respondents.*

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Sooniram Ramniranjandass v. Alagu Nachiyar Koil.

Presidency Towns Insolvency Act (III of 1909), Ss. 52 and 86—"Trust property"—Monies deposited to credit of temple—Trust or endowment not proved—Payment in full—Official Assignee—Nature of enquiry before.

Where the evidence is not sufficient to prove the creation of a trust or an endowment the mere fact that certain moneys are shown in the accounts as deposited in the name of a temple will not render the monies "trust property". within the meaning of S. 52, Presidency Towns Insolvency Act and they are not liable to be paid in full on the insolvency of the person holding the deposit.

A claim that certain property has not vested in him at all or that there is a charge on property vested in him cannot be dealt with by the Official Assignee

1. (1936) 44 L.W. 438

* P. C. Appeal No. 71 of 1937. 5th July, 1938.

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as a tribunal. The Official Assignee in such a case is a party litigant. Even if the matter could be regarded as a mere question of admitting or rejecting a proof, when the Official Assignee acts under r. 25 of the second Schedule of the Presidency Towns Insolvency Act, it is more reasonable and more in accordance with a sound interpretation of S. 86 and with English practice under statutory provisions couched in the same terms that the "appeal" from the "act or decision" of the Official Assignee to the Judge should be by motion and that the oral evidence necessary should be taken before the Insolvency Judge himself. The Official Assignee cannot in such a case be regarded as a trial Judge whose estimate of the witnesses' evidence must *prima facie* be accepted.

A. M. Dunne, R. S. Roxburgh and *R. H. Hodge* for Appellant.

Sir Herbert Cunliffe and *J. M. Parikh* for Respondents.

5th July, 1938. Their Lordships' judgment was delivered by

Sir George Rankin.

SIR GEORGE RANKIN.—On the 1st April, 1933, an order of adjudication under the Presidency Towns Insolvency Act (III of 1909) (herein called "the Act"), was made by the High Court at Rangoon against a firm therein called the S.A.R.M. Chettyar Firm and described as carrying on business as bankers and money-lenders in Rangoon. This order was made at the instance of the appellants Sooniram Ramniranjandass as petitioning creditors. At the date of the adjudication order the insolvent firm consisted of three brothers, sons of one Ramaswami Chettyar, who had died some years before. The business was a Hindu joint family business: it had been known at one time as the S.A. Firm and had been carried on by Ramaswami's father and afterwards by Ramaswami as managing member (karta) of the family.

On the 19th December, 1933, the insolvents' schedule of affairs was filed, showing as creditor No. 85 in the list of unsecured creditors, the name of a Hindu temple situate at a place called O'Siruvayal in the Ramnad District of Madras, the place of origin of this Chetty family. The temple is called Alagiya Nachiar temple. The amount of the debt is stated as Rs. 48,915-10-0; the "date when contracted" is entered as April, 1932; and the consideration is described as "deposit". In June of 1934 a proof of debt for the sum mentioned was tendered on behalf of one Annamalai as trustee of the temple, but in July, 1937, this was supplemented by another in which Annamalai claimed to prove on behalf of the deity as a worshipper representing the deity and all the worshippers. In this amended

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proof interest to the date of adjudication is added to the sum appearing in the insolvents' books making the total debt Rs. 51,488-12-3. The debt is described as "amount due on current account which amount was gifted to the said Alagunachiar Koil (temple) by the insolvent firm who retained custody of it as a custodian". In December, 1935, seven affidavits, all in the same form, were filed; by each of which the deponent claimed to be a trustee of the temple and explained that the temple was administered by seven trustees each representing a "karai". They alleged that the insolvent firm was possessed of trust funds belonging to the temple and consented that Annamalai described by them as a close relative of the insolvents should be regarded as a proper person to recover the trust funds for the temple.

By S. 52 of the Act, the property of the insolvent divisible amongst his creditors does not comprise property held by the insolvent on trust for any other person. Upon this well-known principle a proceeding was begun on the 17th February, 1936, in the name of the "85th creditor Alagunachiar Koil" by a statement of claim to recover Rs. 51,488-12-3 in full as trust money. The appellants as "adjudicating creditors" filed objections, whereupon the Official Assignee proceeded to act as a tribunal to decide the matter; and after hearing oral evidence in February, 1936, delivered a written judgment or order dated 12th May, 1936, holding that "the claimant is entitled to be paid fully and to have a charge on the assets of the insolvents for the sum so due". Against this, as a judicial order, the appellants purporting to act under S. 86 of the Act, filed a memorandum of appeal and Braund, J., as the Judge exercising the insolvency jurisdiction of the Court, dealt with the matter on that footing. On 29th June, 1936, he allowed the appeal and declared that the temple had no right to take the sum in question out of the estate of the insolvents or to exclude it from the insolvents' assets in the hands of the Official Assignee. Accordingly he dismissed the application made to the Official Assignee and allowed the appellants certain costs of that application and of the appeal. From this order an appeal was taken to an Appellate Bench of the High Court. The learned Chief Justice and Dunkley, J., having differed in opinion (7th December, 1936), the appeal was referred to Leach, J., as third Judge, who on 21st January, 1937, gave judgment agreeing with

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the Chief Justice in directing that the appeal be allowed and the decision of the Official Assignee restored. From this order the present appeal to His Majesty has been brought.

Whether the claim of the temple be regarded as a mere proof of debt or as a claim to property in the hands of the Official Assignee or to a charge thereon, their Lordships are unable to relate the procedure followed in the High Court to the provisions of the Act. The Official Assignee is the person in whom the insolvent's property vests as owner though only for the benefit of others. How a claim that certain property has not vested in him at all or a claim to have a charge upon property which has vested in him can under the Act be dealt with by him as a tribunal, it is not possible to discover. The Official Assignee in such a matter is a party litigant. Even if the matter could be regarded as a mere question of admitting or rejecting a proof, when the Official Assignee acts under r. 25 of the second schedule, it seems more reasonable aud more in accordance with a sound interpretation of S. 86 and with English practice under statutory provisions couched in the same terms that the "appeal" from the "act or decision" of the Official Assignee to the Judge should be by motion and that the oral evidence necessary should be taken before the insolvency Judge himself. It is at least clear that the present case cannot be concluded by regarding the Official Assignee as a trial Judge whose estimate of the witnesses' evidence must *prima facie* be accepted. Inadmissible evidence has come upon the record as though it were good evidence of custom and witnesses have been asked and have answered questions which are questions of law.

The admissible and relevant evidence lies in a very narrow compass. There are, first, the books of account kept by the insolvent firm. The books for the years prior to 1928 are not available: they are said to have been burnt. But the ledger for certain years between 1928 and 1933 contains an account in the name of the temple which purports to treat the temple as a depositor who is at credit for a sum which in 1928 had amounted with interest to Rs. 36,670 and which had continued to increase by the addition of compound interest with frequent rests and at varying rates till in 1932 it reached the figure of Rs. 48,915-10-0 above-mentioned. The entries make mention of the interest as at "*thavanai*" rates—that is, treating the

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matter as a deposit for a fixed term (apparently two months) at a certain rate of interest appropriate to each term. It is not possible to ascertain the date at which the first credit entry was made or the exact terms thereof or the amount for which the first credit was given but the suggestion made by the respondents was that these entries date probably from the time of Ramaswami's father. There are certain daybook entries to the same effect. The accounts do not show that any drawings had been made by the temple. No books of account kept by or on behalf of the temple have been produced.

In addition to the entries in the insolvents' books there is the oral evidence of a witness Subramoniam Chettyar, given before the Official Assignee. He was one of the claimants, being one of the seven persons who had filed affidavits claiming to be trustees of the temple. He said that each trustee managed the temple's affairs for one year in rotation. He deposed that he came from O'Siruvayal and had known the insolvent's father Ramaswami. He explained that seven "clans" worship this deity: that the eldest member of each clan acts as a trustee; that accounts of receipts and expenditure are kept, but no accounts to show donations to the temple. The main element in his evidence was that a statement had been made to him by the insolvent's father Ramaswami over 20 years before "that there were monies in the name of Alagunachiar in the S.A.R.M. Firm Rangoon"; "that he had set apart this sum for the purpose of charity in his firm and that I could send for the expenses of the temple whenever I required". The witness explained that Ramaswami, who was the eldest brother, the others being minors, managed the affairs of the S.A. family for five or six years and that he had died about 16 or 17 years ago (that is, from 1936). The witness further said that twice after the conversation described by him, he had gone to Ramaswami and got money for the purposes of the temple. No accounts with reference to these monies were produced and no particulars whatsoever given. This evidence is highly suspicious particularly as it seems reasonably clear that the managers of the idol were in ignorance of the credit in the firm's books. If they had made any claim or obtained any money in recent years evidence to prove this would have been readily available, and according to Dunkley, J., it was common ground that the managers were in entire ignorance of the credit. But, as that

learned Judge noticed, the evidence of Subramoniam is as harmless as it is unreliable.

The evidence of a clerk of the insolvents adds little or nothing, but two Chettyar business men were called apparently to explain the practice and intention of Chettyar firms in crediting amounts to charities and temples in their books. The effect of their evidence fairly taken appears to their Lordships to be that it is usual for a firm to credit something towards charity; that if particular sums are credited to a particular deity, that deity is intended to have certain rights as follows: that no money is separately invested or is intended at the time to be withdrawn from use in the firm's business; that interest is credited upon the sum due to the deity at the ordinary rate allowed to customers of the firm, which is lower than the rate obtained by the firm by the use of its money; that the managers of the deity, however, have no right to demand payment when they choose, but the money should be expended for the deity by the firm at the firm's discretion as occasion may arise—in other words the control rests with the firm. This evidence is of importance as an indication of the case made on behalf of the temple; and, as a credit in favour of a deity is not self-explanatory, their Lordships do not treat it as inadmissible. Whether it is correct is another matter: for the purpose of the only question now to be decided it may be taken as correct. The opinions of the witnesses as to the effect in law of such a transaction as they describe are, however, both inadmissible and useless.

Learned counsel for the appellants have not sought to contest the right of the trustees of the temple to rank for dividend as unsecured creditors in respect of the credits in question, but contest the decision of the Appellate Bench restoring the finding of the Official Assignee that these sums are payable in full out of the insolvents' assets. Their Lordships are not concerned, therefore, to examine any contention to the effect that such entries as were made in the insolvents' books create no legal liability—a question which might well prove to be serious and even difficult. The sole question for determination is whether what is proved to have been done by the insolvent firm was sufficient to make them trustees of any fund for the benefit of the temple or to amount in Hindu law to an endowment for the deity. As by Hindu law an endowment

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may be effected without writing, without the appointment of a trustee and without vesting the property in anyone other than the deity, learned Counsel for the respondents preferred to rest his case upon Hindu law. But it is not open to dispute that the respondents' right to payment in full cannot be made out unless there was either a trust or an endowment.

Their Lordships think it reasonably plain that in the present case there was no endowment of any property and no intention on the part of the insolvent firm to hold any property as trustees for the deity. In this view they are in agreement with Braund, J. and Dunkley, J. It may be as well to guard against the supposition that because the other party to the transaction was a deity the insolvents must have made themselves trustees. If, instead of Ramaswami's father entering in his books a credit to the temple by way of charity or by way of promise, the firm had owed to the trustees of the temple a like sum by way of rent and had been allowed to postpone payment on terms as to interest, it is clear that the firm would not have been trustees: to covenant to pay money to trustees does not make one a trustee. The *prima facie* meaning of the entries in the insolvent's books discloses an intention on the part of the firm to treat itself as debtors to the temple in a sum which should increase as time went on. To hold that they are trustees because they have consented to be debtors would not only be unjustified, but would be inconsistent with their intentions as manifested by their conduct in making no allocation of any assets, in using their whole funds in their business as before, and in computing interest at a rate and in a manner applicable to an ordinary customer. If the respondents' witnesses be right, the entries only make the insolvents debtors *sub modo* and on special terms less onerous than their obligations to an ordinary customer—terms which may or may not render their obligations to the temple unenforceable against them. This makes it all the more unreasonable that they should be held to have intended to assume the obligation of trustees. There is no evidence that at any time a particular sum of money was paid to the insolvent firm by themselves on behalf of the temple. The respondents' witnesses speak of Chettyar firms crediting money to a particular deity by way of charity, and in any case there could be no purpose in separating monies in order to mix

them again—unless indeed the firm had been minded to create the appearance of a breach of trust.

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The same reasons are equally forceful to disprove the suggestion that the entries effect an endowment of property for the deity. The first question to be asked on that suggestion is, what property has been made debutter or charged in favour of the idol? The second is, what proof is there of any such intention? As an interpretation of the conduct of the insolvent firm the theory of endowment breaks down as completely as does the theory that the firm intended to declare itself trustees for the temple.

It is thus unnecessary to consider whether in the circumstances of the case insuperable difficulties beset the respondents' attempt to trace trust monies in the hands of the insolvents so as to show that they are represented by assets in existence at the date of the insolvency. The respondents fail to show that the insolvents have created a trust fund or have acted as custodians or trustees of any such fund or of any property belonging to the temple.

Their Lordships will humbly advise His Majesty that this appeal should be allowed, the order appealed from set aside and the order of Braund, J., dated 29th June, 1936, restored. The respondents will pay the appellants' costs throughout—including the costs of the proceedings before the Official Assignee.

Solicitors for Appellant: *Lambert and White.*

Solicitors for Respondents: *Stanley, Johnson & Allen.*

R. C. C.
B. V. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Narayana Mudali and another .. *Appellants** (*Plaintiffs*)

v.

Periya Kalathi Mudali and others .. *Respondents* (*Defendants*).

Narayana Mudali v. Periya Kalathi Mudali.

Jurisdiction—Civil Court—Communal festival in a temple—Suit relating to ritual observances—Right to worship not denied—Maintainability of suit.

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* S.A. Nos. 1180 of 1934 and 38 of 1935. 7th November, 1938.

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The Civil Courts have no jurisdiction to decide matters of ritual except in so far as a decision on such matters is a necessary incident to the decision of a civil right. The general rule is that once the general right to worship is conceded or established, the Courts will not endeavour to lay down the ritual which is to be followed nor will they prescribe the manner in which the worship is to be conducted.

Where certain members of the Senguntha community in a village sued to establish rights known as *Kappu Kattu* and *Diparathana* in a public temple and it appeared that the claim related to certain ritual observances in the communal festival and neither the right to worship nor the right to any office or perquisites attaching thereto was in issue.

Held, that the suit was not of a civil nature and could not therefore be entertained by the Court.

Appeals against the decree of the Court of the Subordinate Judge of Vellore in Appeal Suit Nos. 61 of 1934 and 60 of 1934 preferred against the decrees of the Court of the District Munsif of Ranipet in O. S. Nos. 428 of 1932 and 247 of 1933.

T. V. Ramanatha Aiyar and *M. Seshachalapathi* for Appellants.

K. Rajah Aiyar and *M. Krishna Barathi* for Respondents.

The Court delivered the following

JUDGMENT.—These two appeals both relate to claims made by the appellants who represent the minority section of the Senguntha community in a village, to establish rights of a religious or quasi-religious nature in a village temple. It is common ground that the temple is a public temple with an endowment from public funds, but that the Senguntha community performs certain festivals therein, financing them by contributions levied from the community in proportion to their means. There also appears to be no doubt that, owing to factions in the community, the plaintiffs discontinued their contributions and by way of retaliation, the majority excluded them from certain religious privileges.

Second Appeal No. 1180 relates to an observance known as *Kappu Kattu*. Second Appeal No. 38 relates to another observance known as *Diparathana*. *Kappu Kattu* is a rite whereby the unmarried boys of the caste go through a sort of initiation which consists in the tying of a sacred string round the wrist as preparatory to their taking part along with others in the festival. *Diparathana* consists in the making of offerings of cocoanut, betel and fruits to the God on the occasion of the festival and

the return to the person who makes the offerings of a portion or the whole of the offerings after they have been placed before the God.

The claim of the plaintiffs with reference to the *Kappu Kattu* is that they have a right to present all their boys for this ceremony without restriction and without any question of payment. This claim was resisted by the defendants on the ground that *Kappu Kattu* is conditional on payment of the contributions to the cost of the festival, that the number of boys is restricted and that the choice of those who are to take part in the rite involves a process of selection. With reference to the *Diparathana*, plaintiffs' case was that it was also an absolute right independent of contributions and that it included a right to the return of the whole of the offerings. Defendants' case was that the right to make offerings belonged to the community as a whole unconditionally, but that those who did not contribute to the cost of the festival were entitled to receive back only a half of what they offered.

The main question in this appeal is whether these rights are legal rights which can be the subject of adjudication by the Civil Courts. There is no question here of claiming rights in connection with any office. The plaintiffs claim simply as members of the community all the members of which are entitled to worship in a particular way; so that unless the plaintiffs can show that the refusal to them of the unlimited rights which they claim is the refusal of the right of worship, they have no case on which the Civil Courts can adjudicate. It is well established that the Civil Courts have no jurisdiction to decide matters of ritual except in so far as a decision on such matters is a necessary incident to the decision of a civil right. It is also established that a general right of worship either in a particular temple or outside is a civil right which can be claimed in the courts. There is at least one case in which it has been held that the rejection of a worshipper's offerings is a denial of a civil right of worship in the temple. The well-known *mandagapadi* case reported in *Thirumalai Alwar Aiyangar* v. *Lakshmi Sadagopa Aiyangar*[1], the correctness of which has been doubted in subsequent decisions, held that a right to perform exclusively a *mandagapadi* festival at one's own expense and to

1. (1916) 31 M.L.J. 758.

Narayana Mudali v. Periya Kalathi Mudali.

receive honours thereat is a civil right which can be decreed by the Courts. The logic of this decision is a little difficult to follow; but apparently it was based on the fact that the *mandagapadi* had in fact been recognised as a proprietary right in the family which owned it and had been the subject of partition and otherwise treated as capable of exclusive ownership.

Generally speaking the rule is that once the general right to worship is conceded or established, the Courts will not endeavour to lay down the ritual which is to be followed; nor will they prescribe the manner in which the worship is to be conducted. It is also the rule that when there is no obligation to perform an act of worship, there will be no civil right to claim honours or perquisites of nominal value which ordinarily accompany the voluntary act of worship. The position is different if the perquisites are attached to an office or an obligation; but when there is no obligation to render service to the deity, there is no legal right to claim any honorific return for the services rendered. Cases quoted before me on this subject are *Kooni Meera Sahib* v. *Mahomed Meera Sahib*[1], *Kadirvelu Chetty* v. *Nanjundaiyar*[2], *Ramalingam Pillai* v. *Ponnusami Goundan*[3], *Thathachariar* v. *Srinivasaraghava Aiyangar*[4], *Srinivasa Thathachariar* v. *Srinivasa Aiyangar* and *Srinivasachariar* v. *Srinivasa Thathachariar*[5] and *Periyannan Servai* v. *Mahadevan Ambalam*[6].

Applying the principles laid down in these decisions to the present case, it seems to me fairly clear that no suit lies for either of the reliefs which are claimed. *Kappu Kattu* is an act of ritual, partly religious and partly appertaining to the caste, which is at the most a mere incident in a series of ritual observances making up the communal festival. There is no obligation upon the members of the community to take part in the festival or to have their young men decorated in a particular way by the priest who presides at the festival. Their right to worship has not been denied. It is not in my opinion the duty of the Courts to prescribe the precise ritual to be followed in

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1. (1906) 16 M.L.J. 471: I.L.R. 30 Mad. 15.
2. (1916) 3 L.W. 512.
3. (1932) 38 L.W. 333.
4. (1938) 1 M.L.J. 174.
5. (1899) 9 M.L.J. 355.
6. (1935) 41 L.W. 752.

these voluntary observances nor the persons who are to take the leading part therein.

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The suit for the *Diparathana* seems to me to stand on an even flimsier basis. The plaintiffs seek to establish in the courts their right, at a festival in which no one denies their right to participate, to make offerings to the God and to receive them back intact. The remedy for the refusal of the presiding faction to allow the return of these offerings is to refrain from offering them. If the plaintiffs wish to get the honour and glory attaching to the making of offerings, that is a matter arising out of no legal obligation and forming the basis of no legal claim. It seems to me that both the suits should have been dismissed on the ground that they are not of a civil nature. I do not think it necessary to go into the further question whether, assuming that a civil right to these privileges can be established, the non-payment of contributions provides a sufficient justification for the refusal of these privileges to the plaintiffs.

In the result, therefore, both these appeals are dismissed with costs of the contesting respondents. One set in each appeal.

Leave to appeal is refused.

B.V.V. ——— *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ABDUR RAHMAN.

Konjeti Seshayya and another .. *Appellants** (*Respondents 1 and 5*)

v.

V. Rangiah, Official Receiver, Nellore and others .. *Respondents* (*Petitioner and Respondents 2 to 4*).

Seshayya v. Rangiah.

Provincial Insolvency Act (V of 1920), S. 4—Applicability—Official Receiver applying for refund of sale proceeds of the insolvent's property.

Where the insolvent's property was sold in execution of a decree and the Court came to the conclusion that the realisation of the sale proceeds by the appellants was unjustified, and the Official Receiver made an application for refund of the sale proceeds,

Held, that the Court was entitled to order a refund on the application by the Receiver and he need not be directed to file a suit.

Official Receiver, Jullundur v. *Labhu Ram*, (1933) I.L.R. 14 Lah. 724, followed.

* C. M. A. No. 102 of 1937. 1st November, 1938.

Seshayya v. Rangiah.

Appeal against the order of the District Court of Nellore dated 9th July, 1936 and made in I.A. No. 297 of 1934 in I.P. No. 67 of 1933.

D. R. Krishna Rao for Appellants.

K. Kuppuswami for Respondents.

The Court delivered the following

JUDGMENT.—The only contention which has been raised in this appeal is that an order of refund of the sale proceeds of the insolvents' property should not have been passed in favour of the Official Receiver, Nellore, on an application made by him and that he should have been directed to file a suit against the appellants for this purpose. The facts have been stated by me in the connected appeal No. 465 of 1936 and need not be repeated here. It is quite sufficient to state that the application was made by the Official Receiver to the Insolvency Court under Ss. 4, 5, 51 and 52 of the Provincial Insolvency Act. A reference to S. 52 in the petition was, in the circumstances of the case, unnecessary as the insolvents' property was sold in execution of a decree after the petition for their adjudication had been admitted. A reference to S. 4 of the Act would show that an Insolvency Court has full power to decide all questions whether of title or priority, or of any nature whatsoever, which the Court may deem expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property. The Insolvency Court had thus full power to decide the application made by the Official Receiver and to order a refund if it came to a decision that the realisation of the sale proceeds by the appellants was unjustified. This is exactly what has been done. Reliance was placed in this connection by the Counsel for the appellant on *Din Muhammad* v. *Tara Chand*[1], where a learned Judge of the High Court of Lahore had held that the Insolvency Court was not authorised to direct a refund and the Official Receiver was in that case directed to institute a suit for the recovery of money. This case was, however, overruled by a Division Bench of the same Court in *Official Receiver, Jullundur* v. *Labhu Ram*[2]. The contention raised on behalf of the appellant has thus no force and the appeal is dismissed with costs.

K.C. —— *Appeal dismissed.*

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1. A.I.R. 1930 Lah. 39 2. (1933) I.L.R. 14 Lah. 724.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ABDUR RAHMAN.

Somavarapu Balarami Reddi .. *Appellant** (*4th Respondent*)

v.

The Official Receiver, Nellore .. *Respondent* (*Petitioner*).

Balarami Reddi *v.* Official Receiver, Nellore.

Provincial Insolvency Act (*V of* 1920), *S.* 51—*Scope of—Execution sale after admission of petition—Realisation of assets—Attaching decree-holder, if entitled to retain costs.*

Where moneys are realised in the course of an execution by sale of the insolvent's property after the date of the admission of a petition for insolvency, even an attaching decree-holder is not entitled to retain the costs out of the moneys realised by him in such execution and derive the benefit of the execution as against the Official Receiver. No distinction can be made between an attaching creditor and other decree-holders, so far as S. 51 of the Provincial Insolvency Act is concerned.

Swaminatha Aiyar v. *Official Receiver of South Malabar*, (1933) 65 M.L.J. 402: I.L.R. 57 Mad. 330, not followed.

Official Receiver of Tanjore v. *Venkatarama Iyer*, (1921) 42 M.L.J. 361, referred to.

Appeal against the order of the District Court of Nellore dated 9th July, 1936 and made in I.A. No. 297 of 1934 in I.P. No. 67 of 1933.

U. Ramachandran for Appellant.

K. Kuppuswami for Respondent.

The Court delivered the following

JUDGMENT.—This appeal raises a question of some importance. It relates to the interpretation of the word 'benefit' occurring in S. 51 (1) of the Provincial Insolvency Act. The facts which have led to this appeal are that one Konjeti Seshiah filed a suit (O.S. No. 65 of 1931) for the recovery of money against Duvvur Rami Reddy and Subrami Reddi. This was decreed on 7th October, 1932; but before the decree-holder could bring his judgment-debtor's property to sale in execution, an application for their adjudication was presented. This was admitted shortly after. The decree-holder nevertheless proceeded with his application for execution and brought the judgment-debtors' property to sale. Before the property was sold and money deposited in Court some other creditors who had also secured decrees against these judgment-debtors applied for execution and rateable distribution under S. 73,

* C.M.A. No. 465 of 1936. 1st November, 1938.

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Civil Procedure Code. In spite of the pendency of the Insolvency Petition, the property was sold and the attaching creditors and the other decree-holders succeeding in drawing their proportionate shares out of the sale proceeds of their judgment-debtors' property from the executing Court. After an order of adjudication was passed against these judgment-debtors, the Official Receiver applied for refund of the money drawn by the attaching creditors and the other decree-holder. This petition was allowed by the learned District Judge who, following a Madras case, permitted the attaching creditor to retain the costs out of the money realised by him. The same treatment was not accorded to the other decree-holders and they were ordered to refund the whole of the money drawn by them. One of these decree-holders has appealed and it has been contended on his behalf that it was wrong for the lower Court to draw a distinction between the attaching decree-holder at whose instance the property was sold in execution and the other decree-holders who were held entitled to rateable distribution. An attempt was made to support this contention by certain observations made in *Official Receiver of Tanjore* v. *Venkatarama Iyer*[1]. The facts have not been fully given in the report of that case but a distinction appears to have been attempted to be drawn on behalf of the appellant between the assets realised by the attaching creditor and those which were distributed among the other decree-holders rateably. It was claimed on behalf of the Official Receiver that the attaching creditor alone was entitled to retain the money realised by him under S. 51 of the Provincial Insolvency Act and the other decree-holders who shared the balance of the sale proceeds rateably were not entitled to do the same. This contention was repelled by the learned Officiating Chief Justice in the following words:—

"It is contended that where rateable distribution has been ordered under S. 73 of the Code of Civil Procedure the exception to S 51 (1) of the Provincial Insolvency Act only applies to the amount credited in favour of the attaching decree-holder and not to the amounts rateably distributed to the other decree-holder under the section. No authority is quoted and we can find nothing in the wording of S. 51 to support such a view; nor is any reason suggested for such a differentiation."

This would show that the point which the learned Judges were called upon to decide in that case was entirely different

1. (1921) 42 M.L.J. 361.

from what has to be decided now. The observation that there was nothing in the words of S. 51 of the Provincial Insolvency Act which would entitle a Court to differentiate between an attaching creditor and other decree-holders is relevant, but it must be admitted that it was made in that case with a different object.

The main ground of attack on behalf of the appellant relates to the interpretation of the words 'the benefit of the execution' used in S. 51 (1) of the Provincial Insolvency Act. The section reads as follows:—

"Where execution of a decree has issued against the property of a debtor, no person shall be entitled to the benefit of the execution against the receiver except in respect of assets realised in the course of the execution by sale or otherwise before the date of the admission of the petition."

It has been contended that the words 'the benefit of the execution' should be so construed as "to cover the net realisation in execution after paying the costs." It is not denied in this case that the assets were realised in the course of the execution by sale not before but after the date of the admission of the petition for insolvency. It would therefore follow that in these circumstances no person, whether he is an attaching creditor or other decree-holder, can be h[illegible] to derive the benefit of the execution against the receiver. Would it be legitimate to contend then that a decree-holder should be entitled to retain the costs out of the money realised by him in the course of the execution by sale held after the date of the admission of the petition? The words of the section are, in my opinion, quite unambiguous and the only answer to this question must therefore be in the negative. It cannot be denied that if permitted to do so, the creditor would be receiving the benefit of the execution to the extent of the costs incurred by and awarded to him. The learned Counsel for the appellant has placed his reliance on *Swaminatha Aiyar* v. *Official Receiver of South Malabar*[1], where a learned Judge of this Court when construing S. 51 of the Act observed as follows:—

"I agree that S. 51 does vest the property which has been sold under such circumstances in the Official Receiver but it appears to me a reasonable interpretation of the word 'benefit' to hold that it is the net realisation in execution after paying the costs."

No reasons were given by the learned Judge for arriving at this conclusion and the whole scheme of the Act appears to be

1. (1933) 65 M.L.J. 402: I.L.R. 57 Mad. 330.

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opposed to this interpretation. Would not a decree-holder by realising his costs out of the proceeds of the sale, which have legally vested in the Receiver, derive a benefit for himself at the expense of other creditors? The interpretation may have been considered to be justifiable in view of the provision contained in S. 73 of the Code of Civil Procedure according to which the proceeds of sale have to be applied first in defraying the expenses of the sale before they are distributed amongst various decree-holders. But in view of distinct provision in the Provincial Insolvency Act which is self-contained, a considera-ation of the provisions contained in any other statute would be wholly irrelevant and out of place. Although the case in *Swaminatha Aiyar* v. *Official Receiver of South Malabar*[1], was decided in connection with a claim by an attaching creditor against the Official Receiver, no distinction can be made between an attaching creditor and other decree-holders, so far as S. 51 of the Provincial Insolvency Act is concerned. The observations of the learned Officiating Chief Justice in *Official Receiver of Tanjore* v. *Venkatarama Iyer*[2], although made in another connection are apposite to this case. I would, in the absence of any reasons given by the learned Judge for his opinion in *Swaminatha Aiyar* v. *Official Receiver of South Malabar*[1] with great deference decline to follow the interpretation placed by him on the word 'benefit' in S. 51 of the Act.

For the above reasons I would hold that the appellant cannot claim to retain any benefit for himself out of the money which he had realised in his execution. This appeal therefore fails and is dismissed with costs.

K. C. —— *Appeal dismissed.*

1. (1933) 65 M.L.J. 402: I.L.R. 57 Mad. 330.
2. (1921) 42 M.L.J. 361.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Civil Jurisdiction.]

PRESENT:—MR. JUSTICE VENKATARAMANA RAO.

A. M. Gopalakrishnan .. *Applicant* in Application No. 2162 of 1938*

and

The Official Liquidators, T. N. and Quilon Bank, Limited .. *Applicants in Application No: 2065 of 1938.*

Gopalakrishnan *v.* Official Liquidators, T. N. & Quilon Bank, Ltd.

Liquidation of Bank—Employee's security for good conduct—Deposit of security money earning interest—Whether security deposit was trust money—Whether employee entitled to claim priority of payment from liquidator.

Where an employee of a Bank in liquidation applied to Court to be paid back a sum of money, furnished by him as security for his post, in full and in priority to the claim of any other creditor and on the facts of the case, the question arose whether the nature of the relationship between the Bank and the employee in respect of the amount which was furnished by the employee as cash security in obedience to the rules of the Bank was one of trustee and *cestui que trust* or one of debtor and creditor.

Held, (1) that the amounts received by the Bank as security from the employees were held by the Bank in trust for the employees and they did not form part of the assets of the Bank divisible among its creditors.

Judgment in O. S. A. No. 56 of 1931, dissented from.

Official Assignee of Madras v. *Krishnaji Bhat,* (1929) 59 M.L.J. 718 and *Official Assignee of Madras* v. *Krishnaji Bhat,* (1933) 65 M.L.J. 1: L.R. 60 I.A. 203: I.L.R. 56 Mad. 570 (P.C.), followed.

The principle of the general law of trusts is that when a sum of money is handed to another person who accepts it for a purpose declared at the time, a binding trust is constituted in respect thereof. The fact that the person to whom the money is handed over happens to be a Bank does not affect the principle.

Edwards v. *Glyn,* (1859) 2 El. & El. 29: 121 E.R. 12; *Toovey* v. *Milne,* (1819) 2 B. & Ald. 683: 106 E.R. 514 and *Farley* v. *Turner,* (1856) 26 L.J. Ch. 170, applied.

Where a trust is complete, provision for payment of interest by the trustee would not make the trustee a debtor and from the fact of payment of interest alone the relationship of trustee and *cestui que trust* should not be negatived.

Gee v. *Liddell,* (1866) 35 Beav. 621: 55 E.R. 1038; In re *Alliance Bank of Simla, Ltd,* (1924) 28 C.W.N. 721 and In re *Fazalbhoi Mills, Ltd.,* (1936) 38 Bom.L.R. 541, followed.

If the matter was purely governed by the provisions of the Indian Companies Act, S. 282-B (1) as amended by Act XXII of 1936 there can be no doubt that the answer will be that the relation between the Bank and the employee is one of trustee and *cestui que trust.*

K. Narasimha Aiyar and *K. N. Viswanathan* for Applicant A. M. Gopalakrishnan, an employee.

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* Appln. Nos. 2162 and 2065 of 1938 in O. P. No. 158 of 1938. 18th November, 1938.

Gopalakrishnan v Official Liquidators, T. N. & Quilon Bank, Ltd.

C. Krishnaswami Aiyar instructed by *King and Patridge* for the Official Liquidators.

K. Bhashyam and *V. P. Chakravarthi* for Creditors.

S. Parthasarathy and *V. K. Thiruvenkatachari* for V. S. Venkatarangam, an employee.

The Court delivered the following

JUDGMENT.—In Application No. 2162 of 1938 one A. M. Gopalakrishnan, an employee of the Travancore National and Quilon Bank, Ltd., prays for an order that directions should be issued to the Official Liquidators to pay the sum of Rs. 10,000 furnished by him to the above Bank as security for his post as the Chief Cashier in the Anderson Hall branch, in full and in priority to the claim of any creditor. In support of the application he has filed an affidavit stating that he was employed on the 9th March, 1938 and that his services were terminated due to the fact of the Bank being wound up. He submits that the security account was deposited for a specific purpose agreed upon between him and the Bank and that in the event of any loss caused to the Bank by his misconduct, the Bank might recoup themselves from out of the sum only such loss and nothing more and that on the termination of his services the amount should be returned to him. He contends that the Bank was trustee to him in respect of the said sum and that the said sum was trust money in the hands of the Bank entrusted for a specific purpose. One Venkatarangam, also an employee of the Bank, has made a similar application stating that he was employed in the Mount Road branch of the Travancore National and Quilon Bank, Ltd., and that he has furnished security for Rs. 500. The Official Liquidators also have made an application asking for directions in regard to payment of the amount of security furnished by the employees for the due performance of their duties. The question raised in these applications is one of considerable importance and before dealing with it, it is very necessary to state the facts and circumstances under which the said deposits were made. The Travancore National and Quilon Bank was the result of an amalgamation effected between the Travancore National Bank, Ltd., and the Quilon Bank, Ltd., on the 19th September, 1937. Thereafter the amalgamated Bank was styled as the Travancore National and Quilon Bank, Ltd. It also employed the staff of the Quilon Bank. Both the above-mentioned Banks took cash securities

from a large number of employees. The cash securities given by the employees of the Quilon Bank, Ltd., were transferred to the Travancore National and Quilon Bank, Ltd. It will be seen from the rules of service of the Travancore National Bank, Ltd., which governs the present Travancore National and Quilon Bank, Ltd., that it is incumbent on all employees of the Bank to furnish cash security. R. 29 provides thus:—

" It is incumbent on all employees of the Bank to furnish a cash security as they have to work in positions of trust. The following table will show the security required from the different classes of employees:

(a) Superior—

On probation	..	..	Rs. 500.
On confirmation	..	..	Rs. 1,000.

(b) Subordinate—

1. First grade clerks Rs. 500 to 1,000 according to the responsibilities of the office one holds.

(c) Menial—

Rs. 50 to Rs. 200.

In the case of the Menials the managemant shall have the discretion to dispense with or regulate the amount of security."

There is no other rule or regulation as to how the security when furnished is to be dealt with by the Bank. Mr. Verghese, the Superintendent of the Travancore National and Quilon Bank has deposed to the following effect in his affidavit:—

"3. After the passing of the Indian Companies Amendment Act, 1936 and in view of the provisions of S. 282-B of the Indian Companies Act it was thought necessary to deal specifically with the cash securities and therefore the cash securities deposited with the Travancore National Bank, Ltd., before the date of amalgamation and those cash securities transferred by the Quilon Bank, Ltd., were treated as having been paid back to and re-deposited by the employees. The old receipts granted by the Quilon Bank, Ltd., as well as the Travancore National Bank, Ltd., were returned by the employees and new receipts were issued to the employees by the Travancore National and Quilon Bank, Ltd. The form of the receipt issued by the Travancore National and Quilon Bank, Ltd., is marked Exhibit 'A' and it is filed herewith and it may be read as part of this affidavit. In the receipt it is stated that it is 'Staff Security Deposit Receipt' and that the deposit would bear interest and it further says that the staff security deposit was subject to the rules and regulations of the Bank for the time being in force. But no rules and regulations were framed by the Bank as the Bank went into liquidation in last June. I have countersigned the receipt issued as Superintendent, Staff Department.

"4. * * * * *
There is a separate account kept for staff security deposits, although the deposits were not invested in specific securities.

"7. I also state that after issue by the Travancore National and Quilon Bank, Ltd., of the new deposit receipts they were handed over to the Bank by

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the staff duly discharged and a letter was written to the employees in terms of Ex. 'B' herewith filed and it may be read as part of this affidavit."

The form of the receipt issued by the Travancore National and Quilon Bank, Ltd., which is marked as Ex. A to the said affidavit runs thus:—

"*This Receipt is not Transferable.*

Travancore National and Quilon Bank, Ltd.
(Incorporated in Travancore, 1912.)
Staff Security Deposit Receipt.

Central Office,
Madras, ...

Rs.

Received from
Rupees bearing interest at
per cent. per annum and subject to the Rules and Regulations of the Bank for the time being for such deposits. Received at on .

For Travancore National and Quilon Bank, Ltd.

Accountant. General Manager."

and the letter Ex. B referred to therein is in the following terms:—

"Dear Sir,

Re: Staff Security Deposit Receipt.

We acknowledge receipt of your staff security deposit receipt No. for Rs. issued by the Bank in your favour. The receipt will be retained by the office.

The Bank will have a first charge on the deposit for all monies due from you to the Bank and also for all losses the Bank is put to on account of your negligence or fraud and the Bank will have a right to appropriate the amount, to the satisfaction of such claim as aforesaid to the extent thereof.

Yours faithfully,
General Manager."

The above allegations in the affidavit have not been controverted. On these facts, the question that arises is: what is the nature of the relationship between the Bank and the employee in respect of the amount which was furnished by the employee as cash security in obedience to the rules of the Bank? As stated in the said affidavit, no rules and regulations have been made though the receipt states that the amount was deposited with the Bank subject to the rules governing such deposits. The word 'such' is significant because the rules regulating the ordinary deposits in a Bank either in current account or in fixed deposit are not to govern it. When a person deposits money in current account or fixed deposit, the presumption is that the moment the amount is deposited, it becomes the banker's money. The amount is treated as a loan to the banker who is required to return the same when demanded or at the expiry of the term of

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the fixed deposit. The relationship is one of debtor and creditor and not trustee and *cestui que trust* but when moneys are placed in or remitted to a Bank to apply them for a specific purpose, in which case the Bank must be deemed to hold it in a fiduciary capacity. The principle applicable is thus stated in Halsbury's Laws of England, Vol. 2, page 228 (Hailsham Edn.) :—

"Property which is in the possession of the bankrupt for a specific purpose does not, as a general rule, pass to the trustee, but is clothed with a species of trust and is subject to the same principles as trust property."

The ordinary illustration of this principle is where a banker is asked to collect and remit the amount of bills or cheques sent to him. In a case in *Edwards* v. *Glyn*[1], a sum of £3,000 was furnished by a certain person for the purpose of saving the bank from a run but the purpose could not be effected and the money was therefore returned. The question arose in bankruptcy whether the sum of £3,000 formed part of the general assets of the Bank. Held it would not. Earle, J., observed thus :—

"I also think that this was a specific advance for a specific purpose on the understanding between the bankrupts and their sureties through whom it was procured for them, that the money, if not used for that purpose, should be returned. The money was required to meet a run upon the bankrupt's bank on a particular day and the giving of the guarantee by the sureties, the promise to them by the bankrupts that they would use the money only if it would enable them to meet the run, and the ultimate advance by the defendants of the money, on the strength of the guarantee, form, in my opinion, one transaction. . . . . The case is entirely within the principle of *Toovey* v. *Milne*[2], where £120 had been advanced to the bankrupt, before bankruptcy, for the purpose of settling with his creditors: and he, no settlement having been made, returned part of the money. Abbot, C. J., held that, as the money was advanced for a special purpose and was therefore clothed with a specific trust, the assignee of the bankrupt had no right to it, and that the re-payment of it on the failure of the purpose for which it was advanced, was protected as against them."

In *Farley* v. *Turner*[3], a person who was already having a certain money to his credit in a bank sent a further sum to be placed to its credit intimating at the same time that part of the said sum should be applied in meeting an acceptance of a bill due to a company. The money was sent by him on the 9th December, 1856. The bill was due on 14th December, but in the meantime owing to the death of one of the partners of the bank, it had to be closed and the money was never applied for meeting the acceptance of the bill. It was held that in regard

1. (1859) 2 El. & El. 29 : 121 E.R. 12.
2. (1819) 2 B. & Ald. 683 : 106 E.R. 514.
3. (1856) 26 L. J. Ch. 710.

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to the sum in respect whereof the above intimation was given, it was money placed in the hands of the bank to be applied for a particular purpose and it would not come within the rule of money lodged in a bank by a customer in the common course of business. These cases only illustrate the principle which is a part of the general law of trusts that when a sum of money is handed to another person who accepts it for a purpose declared at the time a binding trust is constituted in respect thereof. The fact that the person to whom the money is handed over happens to be the bank does not affect the principle. In this case, it will be seen that the amount was not deposited by the employee for the purpose of investment in the bank as fixed deposit or in current account just as an ordinary customer. To use the language of Lord Cottenham in *Foley* v. *Hill*[1], the position of the bank when they received the money is not the common position of a banker

> "Which consists of the common case of receiving money from his customer on condition of paying it back when asked for, or when drawn upon, or of receiving money from other parties, to the credit of the customer, upon like conditions to be drawn out by the customer, or in common parlance the money being repaid when asked for."

From r. 29 already referred to, it is clear that the amount given by an employee is furnished as cash security and not for the purpose of investment in current account or fixed deposit. The receipt given also makes it clear. It is styled 'staff security deposit receipt'. The amount was given to the Bank for a specific purpose, that is, it should be held by them in trust for the employee until the termination of his service as a security for his good behaviour, so that, in case he is found guilty of any act or omission in the discharge of his duties and loss should result therefrom, the Bank might recoup such loss and pay the balance. It was therefore received by the Bank on a specific understanding to be applied by the Bank for a specific purpose. This case therefore will certainly come within the principle stated by me, namely, that when money is handed to another person who accepts it for a purpose declared, there will be a trust in respect thereof. The words 'security deposit' connote that the money does not belong to the banker as in the case of an ordinary deposit but is money belonging to the depositor. (*Vide* the observations of Richardson, J., in In re *Alliance Bank of*

1. (1848) 2 H.L.C. 28: 9 E.R. 1002.

Simla, Ltd.[1]) The employee is thus the beneficiary and the Bank is the trustee. The fact that in a certain contingency the Bank might have recourse to the deposit does not confer any beneficial interest therein in the Bank nor make the Bank a beneficiary as contended by Mr. Bhashyam. The question therefore arises whether the provision for payment of interest in the receipt given by the Bank alters the relationship to one of debtor and creditor and converts the money which was advanced for a specific purpose into a mere loan. It seems to me that a provision authorising the trustee to retain trust money with him and pay interest ought not to be made the foundation of a decision on the question whether a certain transaction is a loan or a trust. The proper approach should be to determine whether on an interpretation of a document, if there is one, or from certain proved or admitted acts and circumstances, a trust is established or necessarily arises. If so, a provision for the payment of interest by the trustee does not destroy the character of trust but if on such an interpretation it is not possible to find with definite certainty the nature of the transaction, the provision for payment of interest may be taken into account in arriving at a decision. It is unsafe to negative a trust from the fact that interest is stipulated to be paid on the money received. The reasoning on which the trust is negatived, if I may say so with respect to some of the learned Judges, is not sound. The said reasoning may be best expressed in the language of one of the learned Judges, Munro, J., who dealt with the question in *The Official Assignee* v. *Krishnaswami Naidu*[2], thus:

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"The matter is made still clearer by the fact that the Bank was to pay interest at 5 per cent. per annum on the money deposited. This it would certainly never have agreed to do unless it was to be allowed to use the money and make as much profit as it could. But if the Bank held the money as trust-money, it could not have lawfully used the money for its own benefit. S. 51 of the Indian Trusts Act prohibits a trustee from dealing with trust property for his own profit."

According to this view, if the trustee is allowed to use the trust money for his own benefit, it is inconsistent with the notion of trust. No doubt, it is an inflexible rule of equity that a person in a fiduciary position is not entitled to make a profit but the rule is subject to the qualification 'unless otherwise expressly provided'—*vide* the statement of the rule by Lord

1. (1924) 28 C.W.N. 721 at 729. 2. (1909) I.L.R. 33 Mad. 154.

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Herschell in *Bray* v. *Ford*[1]. In re *Sykes*[2] is a good illustration of the principle that though a trustee may not make a profit out of the trust he may be allowed to do so by a provision in the instrument of trust. S. 51 of the Trusts Act enacts the same rule and the use of the word 'may' is significant. It connotes that the rule can be abrogated by the author of the trust permitting the trustee to make a profit for himself. The true principle as enunciated by Lord Herschell and as laid down in S. 51 of the Indian Trusts Act was not kept in view in the cases which refused to recognise the trust on the ground that the trustee was allowed to make use of the trust moneys. I may usefully refer in this connection to the case of *Gee* v. *Liddell*[3], which was followed in In re *Alliance Bank of Simla, Ltd.*[4] and In re *Fasalbhai Mills, Ltd.*[5], as an illustration of both the positions which I have outlined above, namely, (1) where a trust is complete, provision for payment of interest by the trustee would not make the trustee a debtor; and (2) from the fact of payment of interest alone the relationship of trustee and *cestui que trust* should not be negatived. The following observations of Sir John Romilly in the said case are instructive:—

"I have therefore only to consider whether, in this case, the relation of trustee and *cestui que trust* exists. In the first place Stephen Gee, by his will, leaves £2,000 of which the interest is to be paid to his daughter for her life, and after her death to her children equally. The testator also says to his only son and executor, "You may invest this or not, as you please but if you retain it you must pay interest for it at 4 per cent." Could Joseph Gee, after proving his father's will and taking possession of his assets, amply sufficient for the payment of the legacy, say that he was not a trustee of that £2,000? That would he impossible. The trust is expressly declared by the will. He is told that he need not invest it, but may retain it in his own hands as trustee. I am of opinion that the relation of trustee and *cestui que trust* was completed, and the son was strictly and properly a trustee of that sum of money, although it had not been separated from the estate; because the will of the testator allowed the executor to retain the £2,000 in his hands at interest, and to constitute himself a trustee of that sum without separating it from the mass of the property."

The question therefore is, was the relationship of a trustee and a *cestui que trust* constituted in respect of the sum of money entrusted to a person apart from the question of any payment of interest by him? Therefore the fact that the deposit receipt allows payment of interest which would imply the Bank being

1. (1896) A.C. 44 at 51.
2. (1909) 2 Ch. 241.
3. (1866) 35 Beav. 621: 55 E.R. 1038.
4. (1924) 28 C.W.N. 721 at 729.
5. (1936) 38 Bom.L.R. 541.

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permitted to use the moneys does not render the relation between the Bank and the employee any the less a relation of trustee and *cestui que trust*. It was open to the Bank to have kept the money separate without mixing it with the assets of the Bank but that such deposits stand on a different footing is evidenced by the fact that a separate account was kept for them. If the matter was governed by the provisions of the Indian Companies Act as amended by Act XXII of 1936 there can be no doubt about the answer to this case. The answer is that the moneys held in security deposit were held in trust by the Bank. S. 282-B (1) is decisive of the matter. There is a statutory prohibition against the utilisation of any portion of the moneys except for purposes agreed to in the contract of service. In my opinion the section only declares the correct legal position of the Bank in regard to those moneys, namely, that they cannot be considered as mere deposits with a banker and do not form part of the assets of the Bank. But the provisions of that section cannot apply to the present case because so far as this matter is concerned the Bank is governed by the provisions of the Travancore Regulations where there is no provision corresponding to S. 282-B (1). My learned brother Gentle, J., in a similar case, namely, in In the matter of *The Hindustan Commercial Bank*[1], in a well-considered judgment, if I may say so with respect, took the correct view, namely, that the moneys paid by way of security deposit in respect of the employees' faithful service were trust moneys but the learned Judge felt himself compelled to decide otherwise in a later case (Application No. 1883 of 1937 in O. P. No. 23 of 1937) in view of the decision of a Division Bench (Beasley, C.J. and Cornish, J.) in O.S.A. No. 56 of 1931 decided on 8th April, 1932. Gentle, J., in the course of the judgment remarked thus:

> " In my view, the facts in that decision of a Bench of this Court are indistinguishable from the facts before me."

Then he referred to the following observations of the learned Chief Justice:

> " It seems to us to be that the appellant agreed with the company that they should receive the Rs. 1,000 and hold that same paying interest at 5 per cent. for its use, the money being repayable, if not forfeited, for losses occasioned through the appellant's default, upon his ceasing to be the cashier of the company. That being so, it seems to me that there was no trust here at all."

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1. A.I.R. 1938 Mad. 651 : 1938 M.W.N. 7.

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The decision in O.S.A. No. 56 of 1931 confirmed the decision of Madhavan Nair, J., in *Venkatasami Achari* v. *The Madras Publicity Co.*[1] It therefore becomes necessary to examine closely the facts and reasoning on which the decision rests and see if it is a compelling authority. When the matter was first heard by me, I felt like my learned brother Gentle, J., that sitting as a single Judge I should not ignore the decision of a Bench whatever my personal view of the matter may be; but on a close examination of the case and the reasoning of the learned Judges in view of later pronouncements on the subject and particularly of those of the very same learned Judges I have come to the conclusion that though the facts of that case may or may not have justified that decision it cannot be treated as a binding authority on the facts of this particular case or as laying down a general proposition of law which should govern cases of this description. So far as the facts are concerned, the learned Chief Justice says that he had to deal with the case upon very meagre information. The petitioner in that case was employed in the company as a cashier in 1925 and he deposited a sum of Rs. 1,000 as security for the office and the same carried a nominal interest of 5 per cent. per annum. Whether any receipt was given in that case as in this case is not clear from the judgment. After a few days' employment as cashier he became a purchasing clerk of the company, an office which required no security. He appears to have sued the company and obtained a decree against it for the return of the deposit money in 1928 but before he could recover it the company was compulsorily wound up in 1929. On that state of facts both the decision of the learned Judge and that of the division bench rested. It does not appear from the facts whether a separate account was opened and whether the deposit receipt stated that it was subject to any rules and regulations of the company. The learned Judge Madhavan Nair, J., purported to follow a decision of the Bombay High Court reported in *Malvankar* v. *Credit Bank of India, Ltd.*[2] and a decision of the Allahabad High Court reported in In the matter of *Annapurna Co., Ltd.*[3] and incidentally referred to with approval the case in *Nagappa Chettiar* v. *Official Assignee, Madras*[4]. This is what the learned

1. (1938) M.W.N. 1347.
2. (1914) 16 Bom. L.R. 733.
3. (1925) 93 I.C. 93 : 24 A.L.J. 347.
4. (1930) 60 M.L.J. 355.

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Judge says:

> "It may be noticed that in the present case the initial deposit after the transfer of the applicant from the cashier's post to that of a purchasing clerk remained in the hands of the company *not as security but only as an advance made by him to the company purely for earning interest.*"

On this finding of fact both the learned Judge's decision and that of the division bench are perfectly justified and are not authorities on the question which I am now called upon to decide in this case. The observations of the learned Judges in regard to the present question must only be treated as *obiter* though they are entitled to great weight. The learned Judge (Madhavan Nair, J.) after that finding goes on to observe thus:

> "*Even if the amount is to be treated as a security* according to the Bombay decision it is clear the applicant's position is only that of an ordinary creditor of the company."

The Bombay case referred to by the learned Judge is *Malvankar* v. *Credit Bank of India, Ltd.*[1] The facts of that case are these: A certain employee at the time of his employment was called upon to give a security of Rs. 5,000 cash to be deposited with the Bank. The amount of Rs. 4,500 out of Rs. 5,000 was credited to the security deposit account and bore interest at 6 per cent. per annum. A receipt was given to this effect:

> "Received . . . . . . Rs. 4,500 only as a security deposit subject to the service regulations of this Bank bearing interest at the rate of 6 per cent. per annum."

In the liquidation proceedings, the employee put forward his claim to Rs. 4,500 in priority to the creditors of the Bank on the ground that the Bank held the moneys in the nature of a trust. Macleod, J., negatived his claim. As this decision was confirmed by the division bench consisting of Scott, C. J., and Davar, J., and followed by the Bombay High Court consistently up to now, I shall quote *in extenso* the reasoning on which that judgment was based. Macleod, J., observes thus:—

> "Mr. Jinnah argued that the Rs. 4,500 was paid to the Bank to be held by them upon trust, that his client was entitled to follow the trust fund in the hands of the Bank, and that, if the Bank had mixed the trust-money with its own monies, whatever moneys were found with the Bank at the date of liquidation up to Rs. 4,500 must be considered as trust-money. That argument, I think, is perfectly sound. If Malvankar had given Rs. 4,500 to the Bank to be held by the Bank during the period of his employment as security for his honesty and fidelity the Bank would have been bound to keep that sum separate and if they mixed it with their own monies he would be entitled

1. (1914) 16 Bom.L.R. 733.

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to recover it out of the cash balance of the Bank at the termination of his employment. But unfortunately for him this was not the arrangement he made with the Bank. He agreed in effect that the Bank should treat his Rs. 4,500 in the same way as money deposited by a customer. He was to receive interest on it at six per cent. as long as he remained in the employment in the Bank. If that ceased he would be entitled to recover the principal with interest to date, provided that the Bank had no claim against him in respect of defalcation or otherwise. The Bank was entitled to invest the money in any way they pleased as no stipulation was made regarding the method of investment . . . . As the case stands I can see no difference between him and an ordinary depositor except that the deposit was not for a fixed period but for the time he remained in the employment of the Bank."

Scott, C. J., delivered a very short judgment and he summed up his conclusion thus:

"If the money has, with the consent of the giver of the security, been received by the Bank and mixed with its funds in consideration of an agreement to pay interest on it, the Bank is only a debtor and not a trustee."

It will be seen from the observations of Macleod, J., that he accepted the argument of Mr. Jinnah as sound, namely, that if the employee had given the money to the Bank to be held by them during the period of his employment as security for his honesty and fidelity, it would be trust-money but he took a different view because of the arrangement that the Bank should pay interest, and this was in effect according to the learned Judge that the Bank should treat it in the same way as money deposited by a customer. Of course the fallacy, if I may say so with respect, lies in not noticing the principle that the character of a completed trust is not destroyed by the trustee being permitted to use the trust fund and pay interest thereon, a position which was recognised by *Gee* v. *Liddell*[1] and laid down so far as India is concerned by the decision of the Privy Council in *Official Assignee of Madras* v. *Krishnaji Bhat*[2]. The decision also fails to notice that the payment of interest is not necessarily incompatible with the notion of a trust. It is unnecessary for me to notice the other decisions of the Bombay High Court, for example, *Official Assignee, Bombay* v. *Moulvi Abdul Hayee*[3], *National Petroleum Co., Ltd.* v. *Popatlal Mulji*[4] and In re *Manekji Petit Manufacturing Co.*[5], because the reason given in those cases was the same given by Macleod, J., and Scott, C.J., though Kanya, J., took a different view in In re *Fasalbhai Mills, Ltd.*[6], already referred to. The decision of the Allahabad

1. (1866) 35 Beav. 621: 55 E.R. 1038.
2. (1933) 65 M.L.J. 1: L.R. 60 I.A. 203: I.L.R. 56 Mad. 570 (P.C.).
3. (1933) I.L.R. 58 Bom. 67.
4. (1936) I.L.R. 60 Bom. 954.
5. (1931) 34 Bom. L.R. 728.
6. (1936) 38 Bom. L.R. 541.

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High Court in In the matter of *Annapurna Co., Ltd.*[1], does not throw much light on the question. In that case *T's* son was employed on *T* furnishing a security of Rs. 10,000 and the money was to be repaid after the expiry of the term of appointment or as soon as the appointment terminated. With a part of this money, namely, Rs. 3,500, a flour mill was purchased. On the company going into liquidation, *T* claimed preference over all the creditors in respect of the sum of Rs. 3,500 on the ground that it was a charge over the mill. The charge was negatived. With regard to the preferential claim this is all that appears in the judgment:

> "As to preferential claim, he is as much in the position of a creditor as anybody else."

It may be noticed that no preferential claim was made in respect of the balance of Rs. 6,500 and no argument was based on the question of trust. This decision was followed by Harries, J., in a recent case, *Maheshwari Bros.* v. *Official Liquidators, Indra Sugar Works*[2]. There is no discussion of the matter and the learned Judge follows the above cases and also the decisions of the Bombay High Court in *Malvankar* v. *Credit Bank of India, Ltd.*[3] and In re *Manekji Petit Manufacturing Co.*[4] The learned Judge also notices the decision of Gentle, J., in In the matter of *The Hindustan Commercial Bank*[5] and remarks thus:—

> "There is one very important distinction of fact between this Madras case and the present case. In the Madras case the sum of money handed to the Bank by way of security deposit was placed to a special account in the Bank, that is, was placed in a fixed deposit account in the name of the employee who deposited such sums. In the present case the receipt which is before me shows that the company merely acknowledged the receipt of Rs. 50,000 from the applicants and did not deposit it in any account in the name of the applicants."

The view of the learned Judge therefore is that if the deposit were treated differently from an ordinary deposit paid in current account or fixed deposit, he would have decided th other way. But of course the learned Judge winds up b saying that

> "even if this distinction of fact is not of importance, I am unable to follow the view expressed by the Madras High Court and I am bound to follow the Bench decision of this Court which is binding upon me as a single judge."

1. (1925) 93 I.C. 93: 24 A.L.J. 347.
2. A.I.R. 1938 All. 574 at 576.
3. (1914) 16 Bom. L.R. 733.
4. (1931) 34 Bom. L.R. 728.
5. A.I.R. 1938 Mad. 651: 1938 M.W.N, 7.

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Therefore the learned Judge felt himself compelled to decide in the way he did. It will be seen from the decision of Beasley, C.J., in O.S.A. No. 56 of 1931 that the learned Chief Justice lays stress on the fact that the company was allowed to use the money paying interest at 5 per cent. It is unnecessary for me again to say that this view is not sound but the learned Judge sitting with Madhavan Nair, J., has not taken the same view in a later case, *Veerappa Chetty* v. *Official Assignee, Madras*[1]. In that case the learned Judge was considering whether a certain transaction was a trust or not. In that connection he had to consider the decision in *Official Assignee of Madras* v. *Krishnaji Bhat*[2], which was later confirmed by the Privy Council in *Official Assignee; Madras* v. *Krishnaji Bhat*[3]. The facts in that case were as follows. The plaintiff's father deposited a sum of Rs. 10,000 in the name of his minor son Krishnaji with Tawker & Sons, the terms being that the defendant should invest the said sum in their firm or in any other firm as the Tawker & Sons might deem fit and pay interest at 9 per cent. per annum and pay the principal to the plaintiff when Krishnaji Bhat attained 21 years. The letter was to the following effect:

> "It is my request that you should invest in your firm Rs. 10,000 in the name of my minor son T.S. Krishnaji Bhat, and pay him the interest accruing thereon. . . . Until my said son becomes 21 years of age, you need not hand over the principal to him, only the interest you can be paying to my family."

A few days later Tawker & Sons gave a receipt to the plaintiff's father in these terms:

> "Received from Mr. T. Sivasankar Bhat the sum of Rs. 10,000 only through Mr. T. Sadasiva Tawker as fixed deposit in the name of his minor son T. Krishnaji Bhat as per instructions contained in Mr. Sivasankar Bhat's letter dated 5th instant, carrying interest at 9 per cent. per annum."

Four years later the plaintiff instituted a suit against Tawker & Sons alleging that they were then involved in financial difficulties and were likely to be adjudged insolvents. While the suit was pending, Tawker & Sons were adjudged insolvents. The plaintiff claimed the amount on the ground that it was a trust fund and he had a preferential claim over the assets of Tawker & Sons. Kumaraswami Sastri, J., who tried

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1. A.I.R. 1935 Mad. 686. 2. (1929) 59 M.L.J. 718.
3. (1933) 65 M.L.J. 1: L.R. 60 I.A. 203: I.L.R. 56 Mad. 570 (P.C.).

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the suit observed thus in *Krishnaji Bhat* v. *Sadasiva Tawker*[1]:

"The main question is whether the plaintiff is entitled to any preferential claim as regards the Rs. 10,000. There is no dispute that the firm of Tawker & Sons were trustees in respect of Rs. 10,000 deposited by the plaintiff's father with them in trust for his minor son the plaintiff to be paid on the plaintiff attaining majority."

Having observed thus, he proceeded to deal with the other contentions in the case. At page 875, he remarked thus:—

"The contention of Mr. Venkatarama Aiyar. . . . . is two fold. In the first place what he says is this. In the present case, as Tawker & Sons were allowed to use the money, there is no trust; the trust is destroyed and all that the plaintiff is entitled to is to treat himself as a creditor of Tawker & Sons.".

After dealing with the authorities bearing on this contention the learned Judge expressed himself thus:

"If the author of the trust deed agrees that the trustee can use the money for his own benefit there seems to me to be no reason for saying that the trust goes and that it cannot be trust property in any sense of the term because of this liberty given to the trustee. No authority has been cited for so broad a proposition and I am not prepared to hold that the mere fact that Tawker & Sons in this case had power to deal with the property for their own purpose provided they paid interest destroys the character of the trust fund in their hands."

In appeal this decision was confirmed by Reilly, J. and Cornish, J. Their decision is reported in *Official Assignee of Madras* v. *Krishnaji Bhat*[2]. In the course of that judgment, Reilly, J., remarked thus at page *727*:

"The last contention of Mr. Krishnaswami Aiyar is that the subject-matter of this trust was only a debt due from Tawker & Sons to the plaintiff's father. I have indicated already that I do not think on the facts that represents the position correctly."

Cornish, J., went fully into this matter and observed thus:—

"I am of the same opinion. I think that the arrangement evidenced by Exs. A and B was a trust . . . . . When was this trust created? But it has been argued that, notwithstanding the intention of the parties to stand towards one another in the relationship of trustees and beneficiary, the arrangement whereby the trustees were to have the use of the trust money for investment in their business is so incompatible with the notion of a trust, that no trust can be inferred, and that the parties must be taken as standing in the relationship of debtor and creditor only in respect of the Rs. 10,000. No doubt, it is a well-established principle that a trustee is to make no profit out of the trust fund . . . . But it is open to a settlor when creating a trust to make it advantageous to the person appointed trustee to undertake the trusteeship, and to determine the purpose for which the trust fund shall be

1. (1926) 24 L.W. 869 at 873. 2. (1929) 59 M.L.J. 718.

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utilised. There is nothing illegal in a settlor authorising by the instrument of trust the trustee to invest the trust money in a business, whether the trustee's own business or some other business, and providing that interest shall be paid for the use of the money so invested."

It will be seen from these remarks that Cornish, J., fully realises the principle laid down in *Gee* v. *Liddell*[1]. The learned Judge in effect says that there is nothing so incompatible with the notion of a trust by reason of the fact that the trustees were to have the use of the trust money. The learned Judge also thinks that if a trustee is authorised to invest trust money in a business of his own the character of the trust is not destroyed. In effect the learned Judge goes back upon the view he expressed while sitting with Beasley, C.J., in O.S. A. No. 56 of 1931. Beasley, C. J., after referring to the facts of the decision in *Krishnaji Bhat's case* as stated by Reilly and Cornish, JJ., agrees with the conclusion arrived at by the learned Judges in that case (vide *Veerappa Chetty* v. *Official Assignee, Madras*[2]). And at page 691 he repeats the remarks of Cornish, J. and then concludes thus:—

"The defendants there contended that their liability was only the liability of debtor to creditor and that the doctrine of tracing did not apply. This contention was directly negatived by the appellate Court."

In effect therefore the learned Judge did not adhere to the view which he indicated in O.S.A. No. 56 of 1931, namely, that the use of the trust money by the trustee is incompatible with the notion of a trust. In a recent decision reported in *Official Assignee, Madras* v. *Muthayee Achi*[3], Madhavan Nair, J., sitting with Pandrang Row, J., also took a view different from what he did in the application from which the O.S. Appeal arose. In that case the plaintiff was married to the first defendant. Defendants 2 and 3 were the Official Assignees of Rangoon and Madras representing the firm of T. Ar. A. Rm. which was adjudicated insolvent. The said firm belonged to the first defendant's family and was carried on by the first defendant's father Ramanathan Chettiar. The plaintiff sued to recover a large sum of Rs. 79,000 and odd on the ground that it was a sum held in trust by the firm. One of the questions was whether the money was held in trust or whether the relationship of the firm to her was that of mere debtor and creditor. The facts

1. (1866) 35 Beav. 621: 55 E.R. 1038.
2. A.I.R. 1935 Mad. 686 at 690 and 691.
3. (1937) M.W.N. 493.

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accepted by the learned Judge were as follows:

"The moneys in the form of hundis are given at the time of the marriage by the bride's parent's family into the hands of the father-in-law of the bride for investment in business, for the benefit of the bride and the children that may be born to her after the marriage. These amounts are to be invested in the money-lending business of the bride-groom's family, if that family has such a business or in some other business. When the moneys are received the person who receives it, the bride-groom's father or the senior male member of his family, knows the purpose for which the amounts have been given to him and what he is expected to do with them. He receives them on the understanding that he is to invest them in business and allow them to accumulate by accretions of interest. It was for the purpose just mentioned and for this purpose alone that the hundies were handed over by the plaintiff's grandfather and father to the first defendant's father."

After stating those facts, the learned Judge observes thus:—

"In these circumstances we have no doubt that the hundi amounts received by the first defendant's father must be viewed as constituting a trust fund in favour of the plaintiff to be held by the first defendant's father as a trustee for her benefit and the relationship between her and the first defendant's father with respect to these amounts must be held to be that of *cestui que trust* and trustee."

The learned Judge took this view in spite of the fact that the first defendant's father was allowed to use the money in his own business and make a profit out of it and he had to pay interest thereon. The learned Judge also discusses the view laid down in *Nagappa Chettiar* v. *Official Assignee, Madras*,[1] namely, where a trustee is authorised by the terms of the trust to invest the trust money in his own business and directed to pay interest thereon, it ceases to be trust property and holds that this view is overruled by the decision of the Privy Council in *Official Assignee of Madras* v. *Krishnaji Bhat*[2]. The learned Judge further observes that the decision in *Official Assignee of Madras* v. *Krishnaswami Naidu*[3], must also be deemed to have been overruled. It is therefore clear that the learned Judge did not adhere to the view which was the foundation of the decision in *Malvankar* v. *Credit Bank of India, Ltd.*[4], which he followed in Application No. 1883 of 1937 in O.P. No. 23 of 1937. Thus all the learned Judges, Beasley, C.J., Madhavan Nair, J. and Cornish J., have gone back upon the observations made by them in the case out of which O.S.A. No. 56 of 1931 arose. Further as I have pointed out, the facts of the case on

1. (1930) 60 M.L.J. 355.
2. (1933) 65 M.L.J. 1 : L.R. 60 I.A. 203 : I.L.R. 56 Mad. 570 (P.C.).
3. (1909) I.L.R. 33 Mad. 154. 4. (1914) 16 Bom.L.R. 733.

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which the decision rested as stated by Madhavan Nair, J., were different. It is no doubt true that the decision of the Privy Council in *Official Assignee of Madras* v. *Krishnaji Bhat*[1], proceeds on the footing that a trust was admitted but the learned Judges who dealt with the case in the High Court inferred a trust, apart from the admission. The said case is an authority for the position that a trustee can be allowed to use trust moneys and make a profit for himself paying interest to the beneficiaries, if authorised by the author of the trust. It is also an authority for the position that the character of a trust fund is not destroyed by allowing the trustee to utilise such moneys in his own business. In the circumstances I do not feel that the judgment in O.S.A. No. 56 of 1931 is a binding authority on me and the observations therein on the question before me are only *obiter*. Before my learned brother Gentle, J., the judgment of Madhavan Nair, J., was not referred to nor was my learned brother referred to the decisions embodying their later view. Therefore on principle I am of the opinion that the amounts received by the Bank as security from the employees were held by the Bank in trust for the employees and they did not form part of the assets of the Bank divisible among its creditors. I therefore direct that the sum of Rs. 10,000 and interest thereon up to the date of winding up be paid by the Official Liquidators to the applicant A.M. Gopalakrishnan and also a sum of Rs. 500 with interest up to the date of winding up to Venkatarangam but these amounts shall not be disbursed by the Official Liquidators until the expiry of six weeks from this date.

So far as costs are concerned, in Application No. 2065 of 1938, I direct a sum of Rs. 250 to be paid to the Official Liquidators and Rs. 250 to Messrs. S. Parthasarathy and V.K. Tiruvenkatachari and Rs. 350 to be paid to Mr. Bhashyam Aiyangar. In Application No. 2162 of 1938, Mr. K. N. Visvanathan will have Rs. 150 for his costs.

K. C. —— *Applications allowed.*

1. (1933) 65 M.L.J. 1 : L.R. 60 I.A. 203 : I.L.R. 56 Mad. 570 (P.C.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO.

Sarvabhotla Thotapalle Chendikamba .. *Appellant* (1st Defendant)*

v.

Kanala Indrakanti Viswanathamayya and others .. *Respondents (Plaintiff and Defendants 3 and 4).*

Chendikamba v. Viswanathamayya.

Evidence Act (I of 1872)—Suit by presumptive reversioner to declare a sale by widow as not binding on reversion—Statement by plaintiff reversioner in a prior suit as legatee—If admissible in the later suit as reversioner—Statement in prior suit by widow's mother-in-law—Admissible under S. 32 (5) of the Evidence Act.

One *K* died leaving a widow *V* (first defendant). *K* was the adopted son of one *S*. In a suit brought by *V* against *S*, the said *S* made a statement to the effect that *K* was understood to have taken a boy *N*, "son of *L*, who is a *gnati* and a cousin brother" of *K* in adoption. Pending the suit *S* died and the present plaintiff was brought on record as legal representative as a legatee under a will of *S*. In that suit he adopted the contentions of *S*. Later the present suit was brought by the plaintiff as reversioner against *V* for a declaration that a sale-deed executed on her behalf by her father was not binding on him The plaintiff was an heir only as a bandhu. On the question whether there were nearer reversioners or not, the question was raised as to whether the statement of this plaintiff in the prior suit adopting the statement of *S* that there was a *gnati* *L* was admissible in this suit.

Held, that the statement by this plaintiff was then made as a legatee and that statement will not be admissible in this suit as a presumptive reversioner; but the statement of *S* will be admissible under S 32 (5) of the Evidence Act, as *S* was a person having special means of knowledge within the meaning of S. 32 (5) and it was made *ante litem motam* so far as *L's* relationship was concerned.

Case-law discussed.

Appeal against the decree of the Court of the Subordinate Judge of Kurnool in A. S. No. 6 of 1933 preferred against the decree of the Court of the District Munsif of Kurnool in O. S. No. 389 of 1927.

V. Govindarajachari and *B. Lakshminarayana* for Appellant.

S. V. Venugopalachari and *P. C. Parthasarathy Aiyangar* for Respondents.

The Court made the following

ORDER.—This second appeal arises out of a suit for a declaration that the sale-deed, Ex. XI dated 25th March, 1926, executed by the second defendant as the agent of his daughter the first defendant, the widow of one Krishnayya deceased, in

* S. A. No. 990 of 1934. 28th November, 1938.

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favour of the third defendant is not binding on the plaintiff and the fourth defendant after the lifetime of the first defendant. The plaintiff and the fourth defendant claim to be the next reversioners to the estate of the said Krishnayya on the death of the first defendant and their case is that the sale was not for a purpose binding on the estate. The main defence is that the husband of the first defendant left a will in and by which he bequeathed all his property absolutely to the first defendant. It was also pleaded that the plaintiff and the fourth defendant are not the next reversioners and that the suit is not maintainable, and in any event, the sale was supported by necessity. Both the Courts concurrently found against the contentions of the defendants on all their pleas and gave a decree in favour of the plaintiff as prayed for. The first defendant has preferred this appeal.

Mr. Govindarajachari on her behalf has urged three contentions before me. The first contention relates to issue 1 (*a*) in the case, namely, whether the will set up by the first defendant is true and did it confer an absolute estate in the suit property on the first defendant? Both the Courts below have found that the will is not genuine. Mr. Govindarajachari attacks this finding on the ground that both the Courts improperly refused to admit the deposition of certain witnesses, who are dead, taken in a prior litigation to which the plaintiff and the first defendant were parties. The said litigation related to a suit filed by the first defendant for recovery of possession of certain properties belonging to her husband from her mother-in-law, Subbamma ignoring a certain arrangement which was come to between the first defendant's adoptive father and the natural father of her husband in and by which Subbamma was given certain properties absolutely. In the plaint filed in that litigation the plaintiff also relied upon a will left by her husband and the genuineness of it was traversed by the said Subbamma. As many as 36 issues were raised in the case and there was no issue regarding the genuineness of the will in question because it was not necessary to put that matter in issue in the said suit. Nevertheless some witnesses were examined on commission in regard to it. What is now complained of is that the lower Courts have declined to admit the evidence of certain witnesses who are no more. It appears that before the learned District Munsif the said evidence was tendered but he declined to receive

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it. It does not appear that this matter was pressed in appeal before the learned Subordinate Judge. Mr. Govindarajachari urged this contention before me as a question of law on the ground that the evidence should have been admitted under S. 33 of the Evidence Act. Apart from the question whether it is open to Mr. Govindarajachari to advance the contention in view of the same not having been pressed on behalf of his client in the lower appellate Court, it seems to me that the said evidence was quite properly rejected by the learned District Munsif. Under S. 33 of the Evidence Act, before a certain evidence given by a witness in a judicial proceeding can be admitted in a subsequent judicial proceeding, it must be established that the questions in issue were substantially the same in the first as in the second proceeding. I quite realise that no specific issue need have been raised regarding any particular matter in issue between the parties but the matter must have been in issue between them and from the course of the litigation in the prior suit it is clear that the question of genuineness was not one of the questions in issue. I therefore overrule the contention of Mr. Govindarajachari.

The next contention raised is as regards the question of legal necessity for the sale evidenced by Ex. XI. The sale was for a consideration of Rs. 2,500. The purpose recited is for discharging the debts contracted by the first defendant and for meeting certain High Court charges. Both the lower Courts have concurrently found that there was no necessity for making this alienation because the first defendant had ample funds in her hands or at any rate there was no pressure on the estate compelling her to sell the property. I have heard Mr. Govindarajachari at length on this matter, having regard to the fact that the learned Subordinate Judge chose to write a summary and not a very clear judgment on the matter. On the date of sale only Rs. 1,000 cash was paid and for the balance a promissory note for Rs. 1,500 was executed not in favour of the first defendant but in favour of the second defendant by a brother-in-law of the vendee and the amount thereunder is alleged to have been paid three or four months later. It is not proved that any of the creditors were making demands or threatening suits and therefore the first defendant was obliged to sell the property. So far as the maintenance of the widow was concerned, the properties were yielding a decent income, and it is

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in evidence that the widow realised a large sum of over Rs. 5,000 within six months of the date of the sale. The vendee has not gone into the witness-box to prove the circumstances attending the sale. The evidence of D.W. 10 is not very satisfactory and D.W. 12, who is supposed to have negotiated the transaction of sale, does not give any useful evidence because, according to him, the vendee relied upon the will alleged to have been left by the husband of the first defendant and he did not therefore choose to enquire into the truth or otherwise of the indebtedness of the estate. I think it unnecessary to go into the evidence regarding this transaction in detail as I am convinced that the concurrent finding of both the Courts on this point is not wrong.

The last contention urged by Mr. Govindarajachari is that it has not been proved that the plaintiff and the fourth defendant are the next reversioners and the finding of the Courts below on this point is wrong because both the Courts have not given sufficient weight to the admission made by the plaintiff in the prior litigation to which the plaintiff was a party. In that litigation the plaintiff was not impleaded as a party to the suit when it was filed. The main contest was by Subbamma. Among other pleas she set up a plea that the husband of the first defendant adopted a boy called Thotapalli Narasimhayya the son of an alleged *gnati* of the plaintiff's husband and by reason of the said adoption the plaintiff could not recover the property in suit. The averment is thus made in paragraph 17 of her written statement:—

> "The plaintiff's husband having been suffering from illness for about 8 months prior to his death, taking medicine at Kurnool at Giddaloor at Mopoor and Minagallu Villages, Nellore District and he was not cured of that illness. It is learnt that the plaintiff's husband, fearing that he may not survive, took in adoption, a boy by the name of Thotapalli Lakshminarasayya resident of Rekkalvaripalle, Cuddappah District, who is a *gnati* and a cousin brother of the plaintiff's husband and that he executed a will in his favour."

It will be seen from this that Thotapalli Lakshminarasayya is described as a *gnati* and cousin brother of the plaintiff's husband. Subbamma died pending the suit. The plaintiff was brought on record as her legal representative and he filed a written statement adopting the written statement of the said Subbamma. Paragraph 2 of the said written statement is to

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the following effect:

"The first defendant has already filed a written statement in this suit. As the first defendant is acquainted with all the facts therein, this defendant also accepts all the contentions in the statement filed by her."

It will be seen from this that the plaintiff relied on the knowledge of Subbamma and therefore adopted her contentions as his own. What Mr. Govindarajachari contends is that the first defendant in effect admitted that Thotapalli Lakshminarasayya was a *gnati* of the deceased; this admission must be taken as true unless rebutted by satisfactory evidence and he relies on the well-known decision in *Slatterie* v. *Pooley*[1], adopted by the Privy Council in *Chandra Kunwar* v. *Chaudhri Narpat Singh*[2]. Mr. Govindarajachari argues that this principle was not kept in view by both the Courts below and they wrongly threw the onus of establishing that there were no nearer heirs on the first defendant and were content to rely merely on the statement made by the plaintiff in his deposition that the admission made in the prior litigation was false and made for the purpose of the said litigation. The question is how far this contention is tenable and what effect I should give to it. When a suit is brought by a person alleging to be the next reversioner either for a declaration that a certain alienation is not binding on the estate or for recovery of possession consequent on such declaration on the widow's death, the onus of proving that he is the next reversioner is on the plaintiff. The correct rule, if I may say so with respect, is thus laid down by Mr. Seshagiri Aiyar, J., in *Rama Row* v. *Kuttiya Goundan*[3]:

"It is no doubt incumbent on a plaintiff seeking to succeed to property as a reversioner, to establish affirmatively the particular relationship which he puts forward. He is also bound to satisfy the Court that to the best of his knowledge there are no nearer heirs. He cannot be expected to do anything more."

In that case the plaintiff claimed as reversioner to the estate of one Venkataramana Aiyar. The Subordinate Judge dismissed the suit on the ground that on the admission of the plaintiff's witnesses in that case one Ranga Aiyar and others were *dayadis* of the deceased Venkataramana Aiyar and they were alive and therefore the plaintiff did not satisfy the requisite burden of proof. This decision was reversed by the High Court relying

1. (1840) 6 M. & W. 664: 151 E.R. 579.
2. (1906) 17 M.L.J. 103: L.R. 34 I.A. 27: I.L.R. 29 All. 184 (P.C.).
3. (1916) 30 M.L.J. 514: I.L.R. 40 Mad. 654 at 656.

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on the principle above stated. The plaintiff in this case has stated in his deposition that there are no nearer heirs. From Exs. C and C-1 it would appear there were certain agnates of the family in 1864 whose descendants, if alive, might be nearer heirs, but the plaintiff has sworn as also his second witness that there are no descendants of those people now alive. There is no evidence contra. If there was no such admission as is relied on nor the statement of Subbamma in the prior litigation, I think on the basis of the principle in *Rama Row* v. *Kuttiya Goundan*[1], it would be open to both the lower Courts to accept the statement of the plaintiff and it would be the duty of the defendant to let in evidence to controvert the *prima facie* case accepted by the Court. The question is what effect should be given to the said admission and how far the principle in *Rama Row* v. *Kuttiya Goundan*[1] would be affected by this? There is no doubt that the rule enunciated in *Slatterie* v. *Pooley*[2] is that

> "What a party himself admits to be true may reasonably be presumed to be so."

It is equally true that the party making the admission may give evidence to rebut this presumption and unless and until that is satisfactorily done the fact admitted must be taken to be established. No doubt this rule was enunciated with reference to an admission in a deed but I think the same principle will apply to an admission made in a signed pleading. The rule of English Law in regard to admission in pleadings is accurately summed up in Vol. 13, Halsbury's Laws of England, paragraph 757, thus:

> "Pleadings recorded in one cause are admissible in evidence in subsequent proceedings to prove the institution and subject-matter of such cause but are generally inadmissible even as against parties or privies as proof of the truth of the facts stated therein. But . . . . statements made in the course of proceedings by a party upon oath may be admissible in other proceedings as admissions by the party making them."

The rule with reference to a signed pleading is stated by Taylor to a similar effect in paragraph 727 on his book on Evidence. In paragraph 821 there is no doubt a passage to this effect:

> "With respect to admissions by pleading the law at present seems to be that statements which are contained in any pleading, though binding on the

1. (1916) 30 M.L.J. 314: I.L.R. 40 Mad. 654 at 656.
2. (1840) 6 M. & W. 664: 151 E.R. 579.

party making them for all the purposes of the cause, ought not to be regarded in any subsequent action as admissions."

This statement must be understood in the light of the context and the subject-matter with which Taylor was dealing in his book. Taylor was there dealing with admissions which are conclusive and it was with reference to this the said proposition was enunciated. Therefore admissions in that passage mean conclusive admissions. The reference to the cases on which the proposition is based makes this clear. So far as the Indian Law is concerned, there can be no doubt that under the provisions of the Indian Evidence Act, an admission contained in a plaint or written statement, or in an affidavit or in a sworn deposition given by a party in a prior litigation would be regarded as an admission in a subsequent action though it is capable of rebuttal. Therefore the facts asserted by the plaintiff in the prior litigation must be taken to be true unless it is satisfactorily made out by him that they are not. But the question still arises whether the said admission is admissible in evidence as against him in this litigation. The plaintiff adopted the written statement of Subbamma when he was brought on record as the legal representative. As a legal representative it was not open to him to raise any contention different from that raised by Subbamma. Therefore the admission in the prior litigation by the first defendant was in the character of a legal representative of Subbamma as a legatee under her will. But the character in which he sues in this litigation is not as the legal representative of Subbamma but as the reversioner to the estate of Krishnayya. The rule of evidence which is applicable to the case is thus stated in Art. 17 by Stephen in his book on the Digest of the Law of Evidence:—

"A statement made by a party to a proceeding may be an admission whenever it is made, unless it is made by a person suing or sued in a representative character only, in which case (it seems) it must be made whilst the person making it sustains that character."

This principle is embodied in S. 18, cl. 2 of the Indian Evidence Act. The plaintiff did not sustain or hold a representative character in the prior litigation. Nevertheless if the plaintiff were suing for possession of the property it may be that his admission would be evidence against him. But he is suing here not only on his behalf but on behalf of all the reversioners, and it cannot be said that the said admission would bind the fourth defendant in this case who is a reversioner of

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an equal degree with the plaintiff. I am therefore of the opinion that if the admission of the plaintiff in his written statement in the prior litigation were to be construed as admission of the fact that Thotapalli Lakshminarasayya is a *gnati* of Krishnayya it is not admissible against him in this suit. But the statement of Subbamma that Thotapalli Lakshminarasayya is a *gnati* contained in paragraph 17 of her written statement in the prior litigation would be admissible evidence under S. 32, cl. 5 of the Evidence Act. Subbamma was a person having special means of knowledge within the meaning of that clause and it was made ***ante litem motam*** as the question of relationship of Thotapalli Lakshminarasayya to the deceased Krishnayya was not in dispute in the prior litigation (vide *Musammat Biro* v. *Atma Ram*[1]). The plaintiff deposes in this litigation that Subbamma told him that that statement was false; but it is not admissible evidence. The plaintiff deposes that though Lakshminarasayya bears the same surname as the deceased Krishnayya the two Thotapallis are quite distinct, but he admits that Thotapalli Lakshminarasayya belongs to the same gotram as the deceased Krishnayya. It was incumbent upon him to have examined Thotapalli Lakshminarasayya and eliminated the possibility of there being any nearer reversioner being alive. I think it is desirable to have the evidence of the said Thotapalli Lakshminarasayya. It is represented to me by Mr. Venugopalachari that the said Lakshminarasayya is physically disabled from appearing in Court to give evidence. It is therefore desirable to have him examined on commission.

This appeal having been set down to be spoken to this day, the Court made the following

ORDER.—The name of Mr. R. Narayana Rao, B.A., B.L., Pleader, Prodattur, has been suggested to me. I therefore issue a commission to him to examine Thotapalli Lakshminarasayya as a Court witness with liberty to the parties to examine him on the question whether he is a *gnati* of the deceased Krishnayya and generally with reference to the second issue in the case. He is required to return the commission duly executed within 31st January, 1939. Remuneration reserved. The commission is required to record the questions and answers and not merely the answers.

K. C.

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1. (1937) 1 M.L.J. 646: L.R. 64 I.A. 92: 1937 M.W.N. 424 (P.C.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Chokka Dhanamma and another .. *Appellants** (*Defendants 1 and 3*)

v.

The Coromandal Company, Limited, Cocanada and another .. *Respondents* (*Plaintiffs*).

Chokka Dhanamma *v.* Coromandal Co., Ltd., Cocanada.

Carriage of Goods by Sea Act (XXVI of 1925), S. 2 and Sch., Art. IV, r. 2 (q)—'Lighter' at anchorage—Loss of goods—Damage—Carriers' agent responsible for his act—Common carriers liable—'Lighter' not coming within provisions of S. 2—Even otherwise defendants liable for loss.

Certain goods were loaded into a lighter which left for anchorage some 6 or 7 miles away from the wharf one night and returned on the following evening, whereupon the fourth defendant, who was the *tindal*, reported that the boat had sprung a leak and he had been obliged to jettison her cargo during which process some goods had been damaged by sea water, and on enquiry the facts were found to be untrue as the fourth defendant was discovered to have stolen the goods or connived at their removal stealthily from the boat, and the other defendants denied their liability,

Held, that the defendants having been common carriers were liable for loss which was certainly due to the fault of the agent of the carriers, namely, the fourth defendant.

The fact that the boat which carried the goods was only transporting them to another ship which alone carried them to another port would not bring the 'lighter' within the purview of S. 2 of Act XXVI of 1925. Even if it applied, the fact of the 'lighter' coming within the definition of 'ship' in clause (*q*) of r. 2 of Art. IV of the Schedule to the Act, would make defendants liable for the loss.

Appeal against the decree of the District Court of East Godavari at Rajahmundry in Appeal Suit No. 117 of 1933 preferred against the decree of the Court of the Subordinate Judge of Cocanada in O.S. No. 56 of 1931.

V. Govindarajachari and *K. V. Rangacharyulu* for Appellants.

T. Satyanarayanan and *King and Partridge* for Respondents.

The Court delivered the following

JUDGMENT.—This appeal arises out of a contract for the carriage of goods from the wharf at Cocanada to a steamer lying at anchor in the roads. The facts are no longer in dispute. The first plaintiff the Coromandal Company was shipping agent for Messrs. Ralli Brothers and in that capacity through

*S A. No. 5 of 1935. 9th December, 1938.

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its agent the second plaintiff, arranged for the transport of 875 bags of castor seeds in a lighter of which the fourth defendant was the *tindal*, whereas the owner has now been found to be the second defendant, defendants 1 to 3 being members of a joint family. The goods were loaded into the lighter which left for the anchorage some 6 or 7 miles away from the wharf one night and returned on the following evening, whereupon the fourth defendant reported that his boat had sprung a leak and he had been obliged to jettison 330 bags of seeds and further 144 bags had been damaged by sea water. The circumstances were suspicious and an inquiry demonstrated that the fourth defendant's story was false and that the missing bags had been stolen by him or with his connivance. The plaintiffs claimed to recover the value of the lost and damaged goods from all the defendants. Defendants 1 to 3 denied liability, but the suit has been decreed against defendants 1, 2 and 4 and the family properties of the third defendant. The appeal has been preferred by defendants 1 and 3.

There can be no doubt that the damage was caused owing to the criminal act of the fourth defendant. If the defendants are common carriers, they are liable for the loss of goods entrusted to them for carriage unless the loss be due to an act of God or of the King's enemies. It is urged that they are protected by rules made under the Carriage of Goods by Sea Act (XXVI of 1925). The reply to this contention is that by S. 2 of that Act the rules apply only to the carriage of goods by sea in ships carrying goods from any port in British India to any other port whether in or outside British India. There seems to be some doubt whether the anchorage of Cocanada is or is not included within the limits of the port. The plaint asserts that the ships are anchored in the port and there is no denial. But the actual notification prescribing the limits of the port is not in evidence. The matter is to my mind, however, not material. The defendants' lighter would come within the definition of a "ship" in Act XXVI of 1925. It carries goods from the port of Cocanada, but it does not, so far as the evidence goes, carry those goods to any other port and the fact that the goods transported are placed in another ship, which itself carries them to another port, would not to my mind bring this lighter within the purview of S. 2 of Act XXVI of 1925. Moreover, even if this lighter was a "ship" to which that Act

applies, I am of opinion that clause (*q*) of r. 2 of Art. IV of the Schedule to that Act would make the defendants liable for this loss which is certainly due to the fault of the agent of the carriers. The decision of the Court below is correct and the appeal is dismissed with costs.

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K. C. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VARADACHARIAR AND MR. JUSTICE PANDRANG ROW.

Chimakurthi Venkatarathnam .. *Appellant** (*2nd Defendant*)

v.

Nooney Sambasiva Rao and others ... *Respondents* (*Plaintiff and Defendants 1, 3 and 4*).

Venkatarathnam *v.* Sambasiva Rao.

Hindu Law—Family trade—'Kulachara'—Test of—Each case to be decided on particular facts arising—Managing member starting new line of business cannot bind other coparceners by debts incurred.

If parties belong to the Vaisya community and trade is ordinarily their *kulachara*, it cannot be laid down as an independent rule of law that in the case of people belonging to this community, the managing member must be held entitled to bind the other coparceners by debts incurred in connection with a trade carried on by him, without an investigation as to the nature and antecedents of the business

Where in a case it was not disputed that the business of yarn carried on by the elder brother was wholly a new line and the partner with whom he carried on the business was also a stranger and not one with whom the family had been associated in business betore,

Held, the new business of yarn could not be regarded as an 'ancestral' business and therefore the younger brother could not be held liable for debts incurred in connection with it.

Damodaram Chetti v. *Bansilal Abeerchand*, (1926) 55 M.L.J. 471: I.L.R 51 Mad. 711 at 718 and 719, followed.

The question of ratification of a joint family debt by younger members must be decided with reference to the facts of each case.

Palaniappa Chettiar v. *Subramania Aiyar*, (1933) 39 L W. 131, referred to.

Appeal against the decree of the Court of the Subordinate Judge of Guntur in O.S. No. 11 of 1931, etc.

B. Somayya for Appellant.

Ch. Raghava Rao and *K. Kameswara Rao* for Respondents.

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* Appeals Nos. 8 and 222 of 1934. 24th March, 1938.

Venkata-rathnam v. Sambasiva Rao.

Varada-chariar, J.

The judgment of the Court was delivered by

Varadachariar, J.—These two appeals may be conveniently dealt with together as the main question is common to both cases. It happened that the suits out of which these appeals arise were heard by different Judges who have come to opposite conclusions on that question. A.S. No. 8 of 1934 arises out of a suit (O.S. No. 11 of 1931) to enforce a mortgage for Rs. 10,000 executed on 21st December, 1923, by the first defendant for himself and as guardian of his minor younger brother the second defendant and his minor son the third defendant. The mortgagee being dead, the plaintiff, his son is suing to recover the balance due under the mortgage, some amounts having already been paid in part payment of the mortgage debt. A.S. No. 222 of 1934 arises out of a suit for partition instituted by the younger brother, who is the second defendant in the other case, against the elder brother who is the first defendant in the other case and against certain alienees from the elder brother.

The only question which arises for decision in A. S. No. 8 of 1934 relates to the liability of the second defendant, that is, the younger brother for the mortgage debt. The learned Subordinate Judge held that the second defendant's share in the family property was liable only to the extent of Rs. 6,607-2-4. It is contended before us in the appeal that the liability of the second defendant-appellant should be further reduced and that he should not have been held liable for a sum of Rs. 1,100 with interest thereon from the date of the mortgage making a total of Rs. 2,964-11-9 up to the date of the filing of the appeal. In respect of the balance of the decree against the second defendant, no appeal has been preferred.

In A.S. No. 222 of 1934 one question has been raised by the fourth defendant-appellant, who is one of the alienees impleaded as a defendant and another question has been raised by the first defendant who has filed a memorandum of cross-objections. The fourth defendant-appellant purchased two items of the family property (houses) under Ex. VII on 10th July, 1922. The sale purports to have b. en made in satisfaction of the claim of the vendee under an earlier mortgage for Rs. 4,000 dated 6th September, 1921, and for a cash payment of Rs. 496-12-0. The younger brother—the plaintiff—contended that this sale-deed and the mortgage preceding it were not executed for purposes

binding on the joint family and that he was therefore entitled to recover a half share in the property. The learned Subordinate Judge held that out of the consideration for Ex. VII, a sum of Rs. 1,800 was binding on the family and he accordingly directed the plaintiff to be put in possession of a half share in these properties subject to a charge for Rs. 900 in favour of the fourth defendant. He also gave directions for award of mesne profits in respect of the properties covered by Ex. VII. The fourth defendant has appealed against so much of the decree as has declared the sale under Ex. VII not binding on the plaintiff. The first defendant was directed to account to the plaintiff for a sum of Rs. 700 in connection with the *katnam* or dowry said to have been paid to the plaintiff at the time of his marriage. The correctness of this direction is challenged by the first defendant by the memorandum of cross-objections.

The validity of the sale-deed marked Ex. VII in the partition suit and the binding character as against the second defendant of the suit mortgage in A. S. No. 8 of 1934 to the extent of the sum of Rs. 1,100 depend on the determination of one and the same question, namely, whether a business in yarn which the first defendant conducted between 1917 and 1919 was an ancestral family business in connection with which it was open to the first defendant to contract debts binding upon his minor brother's share. Lakshmayya, the father of the two brothers, died in 1909 and the evidence shows that he was doing business, mainly as a commission agent, in various goods including indigo and cotton. After Lakshmayya's death, the first defendant who was a major at the time seems to have continued for some years to do the commission business in partnership with his cousin Basavayya. In 1917 the first defendant (without Basavayya) began to do independent business in yarn and cloth in partnership with one Guntur Subramaniam. In the course of two or three years, this business ended in heavy loss and to pay off his share of the loss the first defendant had to borrow partly under the mortgage which forms the subject-matter of A.S. No. 8 of 1934 and partly under the mortgage which led up to the sale Ex. VII in the partition suit. It appears from the evidence that about two years after the younger brother attained majority, he joined his elder brother in executing four sale-deeds of portions of the joint family property for the purpose of paying off a portion of the mortgage debt. It is in respect of

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the balance that remained unpaid that the mortgage suit has been instituted.

In the mortgage suit, the second defendant sought to repudiate liability for the whole of the mortgage debt, but, as stated already, we are concerned in this appeal only with a part of the consideration for that document, namely, a sum of Rs. 1,100 which admittedly relates to losses incurred in the yarn business. The learned Subordinate Judge who heard the mortgage suit was of opinion that there was no satisfactory evidence to show that the father of these parties ever traded in yarn but he thought nevertheless that the business started by the first defendant did not become a new business simply because there was a change in the commodity in which the first defendant traded. He wound up his discussion of this question by observing that the yarn business was not altogether a different business and that therefore the younger brother was liable for debts incurred in that connection. A point had also been raised by the mortgagee that by joining his elder brother in the subsequent sales of family property made with a view to pay off a portion of the mortgage debt, the younger brother must be deemed to have ratified the mortgage even if it was otherwise not binding on him. On this question the learned Subordinate Judge was of opinion that according to the decisions of this Court, there could not in law be any ratification in a case of this kind; and, on the facts, he held that the younger brother's conduct did not amount to ratification. In the partition suit, however, another learned Judge who had to deal with the question of the younger brother's liability for the debts incurred by the elder brother in connection with the yarn business was of opinion that the yarn business was in all probability the individual business of the elder brother that in any event it was an entirely new one, and that it was also a speculative one unlike the father's commission business. In this view, he came to the conclusion that the younger brother was not liable for debts incurred by the elder brother in that connection.

Having heard arguments in both the appeals on this question, we have come to the conclusion that the younger brother cannot be held liable for the debts incurred by the elder brother in connection with this yarn business. Our attention has been drawn to a number of decisions. We do not think it necessary to notice them in detail because the general result of the discus-

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sion in those cases is that it has to be decided on the facts of each case whether the particular business which the elder brother in a joint Hindu family carries on is or is not an ancestral family business in connection with which the minor member's interests in the family property can be made liable for the trade debts. There may perhaps be some difficulty in reconciling all the dicta found in the relevant authorities. Some of them have laid down a stricter test than other cases; it has sometimes been said that except where the business carried on by the elder brother relates to the same commodity in which the father traded and is carried on in the same place and on the same lines, the business carried on by the elder brother cannot be regarded as a continuation of the ancestral business (cf. *Krishnadhan Banerji* v. *Sanyasi Charan Mandal*[1], *Sanyasi Charan Mandal* v. *Krishnadhan Banerji*[2] and *Sri Thakur Ram Krishna Muraji* v. *Ratan Chand*[3]). A more liberal test has sometimes been adopted (cf. *Ramalinga Chetty* v. *Vellore Mercantile Bank, Ltd.*[4]) and in all probability the observations in *Damodaram Chetti* v. *Bansilal Abeerchand*[5], will be found to lay down the test in terms most favourable to the creditor who lends money to the business. As we have come to the conclusion that even according to the test laid down in *Damodaram Chetti* v. *Bansilal Abeerchand*[5], it is not possible to hold the younger brother bound by the yarn trade debts in this case, we have thought it unnecessary to refer to the other decisions.

It is no doubt true that the parties here belong to the Vaisya community and trade is ordinarily their *kulachara*. This fact may enable the Court more easily to come to a conclusion in favour of the trade being a family trade than when dealing with families belonging to other communities (cf. *Palaniappa Chetty* v. *Official Assignee of Madras*[6]). But it cannot be laid down as an independent rule of law that in the case of people belonging to this community, the managing member must be held entitled to bind the other coparceners by debts incurred in connection with a trade carried on by him, without any investigation as to the nature and antecedents of the business. In

1 (1919) 23 C.W.N. 500.
2. (1922) 43 M L.J. 41 : L.R. 49 I.A. 108 : I.L.R. 49 Cal. 560 (P.C.)
3. (1931) 61 M L J. 665 : L.R 58 I A. 173 : I.L.R. 53 All. 190 (P.C).
4. (1929) 57 M.L.J. 822.
5. (1926) 55 M.L J. 471 : I.L.R. 51 Mad. 711.
6. (1916) 36 I C. 787.

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Damodaram Chetti v. *Bansilal Abeerchand*[1], the learned Judges observe:—

> "The question to be determined in each case should be whether having regard to a recognised business, profession, means of livelihood or what is called the '*kulachara*' of the family, the particular enterprise or embarking was only within the reasonable limits of the exercise thereof or really, having regard to its nature or extent, a new speculative enterprise"

In the present case, it is not disputed that the business in yarn started by the elder brother was a wholly new line. The partner with whom he carried on that business was also a stranger and not one with whom the family has been associated in business before. There is a marked difference between the commission business carried on during the father's lifetime and even by the elder brother for some years after the father's death and the yarn business now in question. In the very nature of things, there could be no serious loss sustained in the commission business even during years when it might not prove very profitable. The circumstances of this yarn trade, especially at the time when the elder brother started that line, that is, in the years 1917 to 1919, were clearly such as to make it a highly speculative line of business. We are accordingly of opinion that the yarn and cotton business of the first defendant cannot be regarded as an "ancestral" business and that the second defendant cannot be held liable for debts incurred in connection with it. The elder brother who is supporting the plaintiff has no doubt deposed that he was doing this business for the benefit of the family and that he has brought all profits earned by him in the different lines of his business as well as losses incurred by him, into the joint family account. But it is clear from his evidence that he brought these items into the family account only in 1930, that is, after disputes had arisen between the brothers and it had become obvious that on the whole the first defendant had sustained heavy losses. On the other hand, it also appears that at the time when the business was being conducted by him, he had separate accounts for the various businesses and one of them, namely, his insurance business, he carried on in the name of his wife. On these facts, we have come to the conclusion that the younger brother cannot be held bound by the mortgages or sales executed by the elder brother so far as they were effected to pay off debts

1. (1926) 55 M.L.J. 471: I.L.R. 51 Mad. 711 at 718 and 719

incurred by him in connection with the yarn trade or to pay off losses incurred in that trade.

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In A. S. No. 8 of 1934, the learned Counsel for the respondent has pressed the plea of ratification. We do not wish to express any opinion as to the correctness or otherwise of the view taken by the learned Subordinate Judge that as a matter of law there could be no ratification in such a case; but we agree with him that on the facts no ratification by the younger brother has been made out. At the time when the sale deeds relied on in this connection were executed, the younger brother was still a student at school and was living with his elder brother; there is nothing to show that he had sufficient knowledge of all the facts with reference to which the question of his liability or non-liability for the debts incurred by the elder brother had to be decided. Whether or not the younger brother is speaking the truth when he says that he signed the sale deeds without even reading them it is quite probable that he signed the sale deeds as desired by the elder brother, without knowing what exactly the effect of that conduct would be on his liability for the remainder of the mortgage debt. The question of ratification must be decided with reference to the facts of each case; and we do not feel that the decision in *Palaniappa Chettiar* v. *Subramania Aiyar*[1], on which Mr. Somayya relies in this connection, compels us to come to the conclusion that the younger brother's conduct in this case also amounts to a ratification. The learned Judges were there dealing with an alleged admission or inference of admission of liability and not with a plea of ratification.

The result is that A. S. No. 8 of 1934 must be allowed and the liability of the second defendant's share for the suit mortgage debt further reduced by the sum of Rs. 1,100 and interest to be calculated thereon on the basis adopted by the learned Subordinate Judge. The appellant will be entitled to recover from the plaintiff his costs of the appeal. A.S. No. 222 of 1934 must, for the same reasons, be dismissed with costs of the plaintiff-respondent. There is however one variation in the lower Court's decree in A.S. No. 222, which seems to us desirable to make to avoid further litigation. In paragraph 3 of its decree, the lower Court has directed that the plaintiff be put

1. (1933) 39 L.W. 131.

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in possession of a half share of the properties covered by Ex. VII, subject to a charge in favour of the fourth defendant for Rs. 900. On the language of the clause as it stands, the fourth defendant may be obliged to file a separate suit for recovery of this sum. We do not think it necessary or desirable to leave the parties in this position. It is better—and the learned Counsel for the plaintiff agrees—that in place of this direction, a direction in the following terms is substituted, namely, that the plaintiff shall be put in possession of a half share on payment of Rs. 900 to the fourth defendant. The provision in respect of interest and mesne profits contained in that clause is not very clear. Under the law, the plaintiff will be entitled to mesne profits in respect of his half share but the fourth defendant will be entitled to interest on the sum of Rs. 900 which has been found to be the portion of the debt binding on the plaintiff. The proper direction will, therefore, be that the plaintiff will have mesne profits from 6th April, 1931, to date of delivery of possession, such mesne profits (including interest) to be fixed by the lower Court under O. 20, r. 12, Civil Procedure Code. The fourth defendant will be paid interest on the sum of Rs. 900 above referred to at six per cent. per annum from 6th April, 1931, to date of payment.

On the point raised by the memorandum of cross-appeal, we think that the decree of the Court below cannot be sustained. Assuming, as the learned Judge observes that the *katnam* paid to the plaintiff at the time of his marriage should be treated as belonging solely to the plaintiff, a point which is by no means free from doubt, it does not follow that the first defendant can be called upon to account to the plaintiff for it unless he has appropriated it. The judgment of the Court below proceeds on the footing that this sum of Rs. 1,400 found its way into the family chest and that the first defendant made a gift to the bride out of the joint family funds. The evidence of P.W. 1 does not justify this assumption. He states that what happened at the time was that the bride's people placed on a plate, the sum of Rs. 1,400 which was meant as *katnam*, that the first defendant in turn placed on it a sum of Rs. 300 and a jewel meant for the bride and that the bride's people took the plate with all its contents back. We are not in this litigation called upon to say whether the money which the bride's people took back is with the plaintiff or with his wife and what their

respective rights to the same are. It is obvious that the sum of Rs. 1,400 never went into first defendant's hands or into the family chest and the first defendant cannot therefore be called upon to account for it. The result is that cl. (2) of the first Court's decree must be modified by omitting the sum of Rs. 700 therefrom. The first defendant will recover his costs of the memorandum of cross-objections from the plaintiff.

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A.S. No. 8 of 1934 allowed.
A.S. No. 222 of 1934 dismissed.

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PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

PRESENT:—LORD THANKERTON, LORD ROMER AND SIR GEORGE RANKIN.

Sreemati Radharani Dassya and others .. *Appellants**

v.

Sreemati Brindarani and others .. *Respondents.*

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Hindu Law—Widow's estate—Surrender—Acceleration of reversion—Sons being reversioners—Deed releasing her interest in deceased infant son's share entered into between widow and one son for benefit of all—Whether deed vitiated for want of proof of consent of all reversioners.

Where, on the death of one of her sons, an infant and unmarried, a widow had succeeded to that sons' share of her late husband's property for the estate of a Hindu mother, and she had subsequently entered into a written agreement with the eldest of her four surviving sons releasing her interest in that share in consideration of a monthly payment to be made to herself for maintenance which deed was intended to benefit all the sons as reversioners,

Held, that there was a *bona fide* surrender of the whole estate and not a mere arrangement for dividing it with the reversioners and that it was valid notwithstanding want of proof of the consent of all the reversioners thereto.

Appeal from a decision of the High Court, Fort William, Bengal, dated 17th January, 1936 (Mitter and Patterson, JJ.) affirming a decision of the Fifth Subordinate Judge, Decca, dated 20th April, 1932, dismissing an action brought by the present appellants.

The plaintiffs were the mother, widow and son of one Matilal Das, who died in 1925, and were the representatives of his estate. Matilal's father was one of five sons to whom one Madhusudan Das had left his property in equal shares. The youngest of the

* P.C. Appeal No 53 of 1937. Bengal Appeal No. 28 of 1936. 19th December, 1938

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five brothers, Sashi Mohan, having, after the death of his father, died an infant and unmarried in 1865, his one-fifth share passed to his mother, Shyam Peary, for the estate of a Hindu mother. In 1877, Shyam Peary entered into two written agreements with her eldest son, whereby she, in consideration of the son's promise to pay her Rs. 150 a month, relinquished her estate in Sashi Mohan's fifth share of his father's estate. The defendant, Brindarani Das, was the only surviving child, and the representative of the estate, of the second of the five sons, Radhika Mohan. In 1878 Radhika died, being succeeded by his widow, Govinda Rani, and two daughters, of whom Brindarani was one. Govinda was accordingly in possession of one-quarter of the estate, which included one-quarter of Sashi Mohan's fifth share, the three surviving brothers holding three-quarters in each case. One of those brothers, Kshetra Mohan, having transferred his share to Mohini Mohan, the eldest son, the widow, having in due course succeeded both him and the widow of the remaining son, Lal Mohan, ended by holding an estate in three-quarters of her late husband's property, and to that three-quarter share on her death in 1918 Matilal succeeded. The plaintiffs now brought this action claiming title also to the one-quarter share of Sashi Mohan's fifth held by Govinda, and later the defendants, through the deceased son Radhika, basing their claim on the ground that Shyam Peary had never validly released her estate in that fifth share, and that Matilal should accordingly have succeeded to it as he had done to the other property held by Shyam Peary. The action having been dismissed by the Subordinate Judge whose decision was affirmed by the Court of Appeal, the plaintiffs now appealed to His Majesty in Council.

J. M. Parikh for Appellants.—The deed entered into between the widow and her eldest son does not operate as a surrender by her of her Hindu widow's estate in the fifth share in question in favour of the other four reversioners, so as to accelerate their succession to the deceased son. There is nothing to show that Mohini Mohan was at the material time the agent of his three brothers to make such a deed and thereby acquire property for them, and the respondents have not discharged the burden which is on them of shewing that the circumstances of the execution of the document were such as to make it a binding surrender by the widow of the interest in question.

J. M. Pringle for Respondents.—It is submitted that there is no question but that the deed entered into between Shyam Peary and Mohini Mohan did in law constitute a complete surrender by Shyam Peary of her rights in respect of Sashi Mohan's fifth share of his father's estate. All her rights in respect of that share having

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become extinguished, it passed to her surviving four sons, which means that one-fourth passed to Radhika and so to the respondent. The deed was a perfectly proper one for the widow to enter into, and there is no evidence that the other sons did not consent to a transaction by which their succession to their deceased brother's share of their father's property was hastened.

19th December, 1938. Their Lordships' judgment was delivered by

Sir George Rankin.

SIR GEORGE RANKIN.—The parties in this case are governed by the Dayabhaga. The appeal is brought by the plaintiffs whose suit, instituted on the 20th September, 1930, in the Court of the Subordinate Judge at Dacca, has been dismissed by the trial Court (20th April, 1932), and by the High Court (17th January, 1936). The plaintiffs are the mother, widow and son of Matilal Das who died on the 24th October, 1925, and between them they represent his estate. They claim that Matilal in 1918 succeeded to the whole estate of his uncle Sashi Mohan who had died unmarried on the 1st October, 1865. The plaintiffs' case is simply that on the death of Sashi Mohan his mother Shyam Peary succeeded to his property for the estate of a Hindu mother, and that on her death (16th November, 1918), Matilal was the nearest reversioner to Sashi Mohan. They admit that, in the events which have happened, they have no need of relief as regards three-quarters of the estate left by Sashi Mohan, but they say that Brindarani Dasi, the first defendant, is in possession of and claims title to the remaining quarter. They seek a declaration of title and a decree for possession against her; the other defendants are joined *pro forma*. Brindarani is the only child of Radhika Mohan surviving at the date of the suit, and she represents his estate.

Madhusudan Das=Shyam Peary
(d. 12-4-1865) (d. 16-11-1918)

Mohini Mohan (d. 1896) | Radhika Mohan (d. 1878) | Lal Mohan (d. 1885) | Kshetra Mohan (d. 1898) | SASHI MOHAN (d 1-10-1865)

Radhika Mohan = widow Govinda Rani (d. 1920)

Lal Mohan = widow Priamoyee (d. 1902)

Kshetra Mohan = Radharani (plff. 1)

Children of Radhika Mohan: Krishna Preyashi (d. 22-5-1930) | Sons defts. 2-6; Brindarani (deft. 1) | Sons defts. 7-12

Child of Kshetra Mohan: Matilal = Brojomohini
(d. 24-10-25) (plff. 2)
Ajit Kumar Das
(minor) (plff. 3)

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There is little room for dispute as to the facts. Madhusudan Das was possessed of considerable property and a money-lending business. He died on the 12th April, 1865, leaving him surviving five sons of whom Sashi Mohan was the youngest. By his will dated the 24th November, 1855, he left his property to his sons in equal shares, and he directed that on his death his properties and business should continue to be managed and enjoyed jointly (in *ejmali*), the charge of the entire estate being made over to the sons as they came of age. As regards his mother and widow, he directed that the amounts that might from time to time become necessary for going to holy places and for other due and needful expenses should be supplied from his estate by all the sons in equal shares. There was a provision entitling each of these ladies in case of disagreement among members of the family to a separate place for her residence, and certain guardians, nominated by the will, were to fix the amount of maintenance. He declared that his widow should be absolutely entitled to her own ornaments and any cash in her possession.

In October, 1865, a few months after the death of Madhusudan, Sashi Mohan died an infant and unmarried; whereupon his mother Shyam Peary succeeded to his one-fifth interest (3 annas 4 gandas) in his father's estate. The eldest of the sons, Mohini Mohan, managed the various properties left by Madhusudan, but, some questions having arisen between him and his three brothers, an agreement in writing dated the 7th December, 1875, was entered into by all four. This document ignored the mother's right to one-fifth of the property as representing Sashi Mohan, and proceeded on the footing that the four surviving brothers were the owners in equal shares. It provided that Mohini Mohan was to continue in management as *karta* consulting with his brothers upon certain matters; that the property should continue to be undivided, each brother drawing Rs. 300 per month from the estate; and that certain complaints which had been submitted to arbitration should be withdrawn.

On the 29th September, 1877, there took place the transaction which gives rise to the dispute which has now been brought before their Lordships. This transaction is evidenced by or contained in two registered instruments each bearing date the 29th September, 1877, one being a *nadabinama* (release)

executed by Shyam Peary and the other an *ekrarnama* (agreement) executed by Mohini Mohan and signed by his brother Lal Mohan as consenting thereto. The former is addressed to Mohini Mohan and the latter to Shyam Peary. The arguments which have been put forward upon the true construction of these documents make it necessary to set them out herein. The question which arises upon them and upon the actings of the parties thereon is whether the Hindu mother's estate of Shyam Peary in the one-fifth share of Sashi Mohan (in his father's property) became extinguished so as to vest Sashi Mohan's one-fifth share in his surviving brothers subject to the monthly allowance of Rs. 150 which Shyam Peary had stipulated for. If the mother's interest was extinguished and the estate vested in the brothers, then the appellants' suit must fail as the Courts in India have held.

To

Sri Mohini Mohan Das, son of late Babu Madhu Sudan Das, inhabitant of Sabjimahal, Police Station Sadar, District Dacca, by occupation money-lender, trader and zemindar, and by caste Barendra Saha.

I, Sreemati Shyampeary Dasya, widow of the said late Babu Madhu Sudan Das, residence, caste and occupation as above, do hereby execute this Nadabinama Patra (Deed of Release) to the effect following:—

My husband Babu Madhu Sudan Das having died, leaving him surviving five sons, namely, yourself, Radhika Mohan Das, Lal Mohan Das, Kshetra Mohan Das and Sasi Mohan Das, two daughters, namely, Sreemati Gangamani and Sreemati Jamuna and myself as his widow and providing by a Will dated the 8th Agrahayan 1262 B.S. that the immovable and movable properties left by him should be possessed, enjoyed and managed by the eldest son in succession, you, being his eldest son and capable obtained a certificate from the District Judge of Dacca under Act 27 of 1860 according to the terms of the said Will and have been possessing, enjoying, managing and acting as Karta of all the movable and immovable properties left by him. In the meantime, owing to bad luck, your youngest brother, born of my womb, namely, Sasi Mohan Das died unmarried on the 16th Aswin 1272 B. S., and although you and my other sons are the next reversioners of the said deceased, yet according to the Sastras I am entitled to a right of enjoyment of the share left by the said deceased son, for my lifetime; I having accordingly applied for obtaining a certificate under Act 27 of 1860, in respect of that share, my application was rejected up to the High Court, and the properties have remained in your possession and enjoyment and under your management. Although, being a Pardanashin woman of a respectable family, I was unable to carry on management, yet being led by the evil advice of mischievous persons, I at times expressed a desire for instituting a title suit in Court for the share of the said deceased son and thus caused pain to the good heart of you, my son, born of my own womb and as you are dissatisfied on account of that, I am in great uneasiness of mind. Whereas my sons, yourself and others, are the real heirs and owners of the share left by the said deceased son, and whereas I am never myself capable of managing the

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same without (the help of) those appointed to act as Karta of the estate left by my husband, namely, yourself and others,—I proposed to give up the right of enjoyment which I have and had in respect of the share left by the said deceased son, in the properties, etc., mentioned in the schedule below and in the properties that may in future be acquired with the profit thereof as well as in the money-lending and trading concern, Government promissory notes, Bank-shares, etc, relating to the said estate, on condition of getting a Mashahara (monthly allowance), on and from the present months till the end of my life, at the rate of Rs. 150 (one hundred and fifty rupees) at a lump per month out of the said estate, that is, the share left by the said deceased son. And having agreed thereto, you have executed in my favour an Ekrarnama (agreement) stipulating to pay a sum of Rs. 150 in lump per month on condition that I shall have no power to sell or give away the right of getting the said money. Therefore being in full possession of my senses and out of my own accord, I give up, by this Nadabi (Release), whatever rights of enjoyment I have or had under the Sastras, in the share left by the deceased sons, on the aforesaid terms. Save and except getting this fixed monthly allowance in respect of the share of the said deceased son, I shall never be entitled to file any suit in Court, demanding any accounts, etc., for the past and making any sort of claims, etc., for the future. If I do the same shall be disallowed by the Court. To this effect I execute this Nadabinama (Deed of Release). Finis, dated the 14th Aswin, 1284 B.S.

To

The worthy of remembrance Sreejukta (worm-eaten—Shyam Peary Dasya, widow of late Madhu Sudan Das inhabitant of (?)) Sahjimahal, Police Station Sadar, District Dacca, by caste Barendra Saha, by occupation, money-lender, trader and zemindar, etc.

I, Mohini Mohan Das, son of the said late Madhusudan Das, inhabitant of the same place, by caste and by occupation as above, do hereby execute his Ekrarnama-patra (agreement) to the effect following:—

That my father, the late Madhu Sudan Das having died on the first Baisakh 1272 B.S. leaving him surviving five sons, namely, myself, Radhikamohan, Lalmohan, Kshetramohan and Sasimohan Das and two daughters, namely, Gangamoni and Jamuna Dasya and a widow, namely, yourself and providing, by a Will dated the eighth Agrahayana 1262 B.S. that the immovable and movable properties left by him should be possessed, enjoyed and managed by the eldest son in succession, I being his eldest son, made an application before the District Judge of Dacca under Act 27 of 1860, according to the terms of the said Will, and obtained a certificate, and have been possessing, enjoying, managing and acting as Karta in respect of all the immovable and movable properties left by him. In the meantime, owing to bad luck, my youngest brother, born of your womb, namely, Sasi Mohan Das died before his marriage on the 16th Aswin 1272 B.S. I and my other brothers are the absolute owners of the (properties of) the said deceased (brother) but as under the Sastras, you are entitled to a right of enjoyment of the share left by our said deceased brother, for your life, you made an application to the District Judge of Dacca for obtaining a certificate under Act 27 of 1860 in respect of the said share, and your prayer in that behalf having been rejected up to the Hon'ble High Court, under the provisions of the said Will, all the properties have remained in my possession and enjoyment as well as under my management. Without remaining satisfied with that order, under the evil advice of mischievous persons, you are expressing a desire for instituting a

regular (title) suit in Court for (worm-eaten) of the son; in that case the properties will be ruined on account of heavy expenditure and both will suffer mental pain and nobody can say what would be the ultimate result. Whereas, in father's Will, there is permission for maintaining you and the sisters, so long as we are capable, and whereas you have by a Nadabi (deed of release) renounced all claims and demands regarding the enjoyment of the share left by the deceased brother Sasimohan, for your life, and have desired to receive a sum of Rs. 150 (one hundred and fifty rupees) in lump per month, from the present month up till the end of your life, out of the share of the said deceased brother—I, under the terms of the Will of my deceased father, and on the strength of my position as Karta of the estate left by him, of my own accord and in full possession of my senses execute this Ekrarnama and provide that so long as you live, you shall get a sum of Rs 150 (one hundred and fifty rupees) in lump per month, out of the said share; you shall not be entitled to give away or sell the same to any one. Myself or the persons acting as Karta after we shall pay up the said money to you every month; if we fail to pay up the same then you shall be entitled to realise the same from the share left by the said deceased brother, by suing for the same in Court; any objection to this either by myself or by my representatives shall not be entertained. To this effect, I execute this Ekrarnama. Finis. Dated the 14th Aswin, 1284 B.S.

On the 26th June, 1878, Radhika Mohan died, leaving a widow, Govinda Rani, and two daughters; so the widow succeeded as his heiress. Thereafter, the three surviving brothers and Govinda Rani, without dividing the properties, were possessed each of one-quarter share of the whole estate left by Madhusudan, until in 1881 Kshetra Mohan transferred his quarter share to his eldest brother, Mohini Mohan. In 1881, Govinda Rani sued her late husband's three brothers (suit No. 73 of 1883 in the Court of the Subordinate Judge of Dacca) alleging that Kshetra Mohan's share had been purchased by Mohini Mohan on behalf of and with monies belonging to himself, Lal Mohan and Radhika's estate. On the 9th July, 1885, her suit was compromised: it was decreed that Govinda Rani's share of Madhusudan's estate should be one-quarter, that is, that the release by Shyam Peary of her right to inherit from Sashi Mohan had vested one-quarter of Sashi Mohan's fifth in Radhika Mohan, and that Govinda Rani was liable to pay one-quarter of the monthly allowance of Rs. 150 payable to Shyam Peary; but Govinda Rani's claim to participate in the purchase of Kshetra Mohan's share was not sustained by the decree.

At the same time another suit was being prosecuted in the same Court [suit No. 85 of 1883] having been brought on the 28th September, 1883, by Shyam Peary against her three sons and Govinda Rani to recover arrears of her monthly allowance

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of Rs. 150 out of the estate of Sashi Mohan on the basis of the *ekrarnama* of the 29th September, 1877, executed by Mohini Mohan. The suit succeeded as against all the defendants both in the trial court (25th April, 1885) and on appeal (2nd June, 1886), Shyam Peary obtaining a decree to recover Rs. 5,837 and certain costs out of the properties mentioned in the schedule to her plaint, that is, a decree to enforce her charge upon the estate of Sashi Mohan.

From the subsequent history of the family as shown in the pedigree table, it sufficiently appears that Shyam Peary succeeded as heiress to Mohini Mohan on his death in 1896 and to Lal Mohan on his widow's death in 1902; and that on the death of Shyam Peary in 1918, Matilal became entitled as the nearest reversioner of these two uncles. In this way he came into possession without difficulty of three-quarters of Madhusudan's whole estate which means that he obtained *inter alia* three-quarters of Sashi Mohan's undivided one-fifth share. In the present suit his representatives now claim against Radhika Mohan's daughter and representative Brindarani that quarter of Sashi Mohan's fifth (namely, one-twentieth or 16 gandas' share of the whole) of which Radhika Mohan's branch has long been in possession.

The appellants contend that the transaction of the 29th September, 1877, is not shown to have been understood by Shyam Peary who was pardanashin; that it transferred merely the management of Sashi Mohan's share to Mohini Mohan; that if it transferred anything by way of title it transferred not her whole interest and estate as a Hindu woman but a mere life estate in the English sense; that it did not operate to accelerate the opening of the succession to Sashi Mohan's estate because it was a transfer to Mohini Mohan alone, and in any case is not shown to have been accepted by all the surviving brothers; and also because of the reservation of the monthly allowance of Rs. 150.

Their Lordships agree with the Courts in India that none of these contentions can be sustained. If the *nadabinama* of 29th September, 1877, be regarded as a transfer, it is not possible to construe it as transferring a mere right of management or anything less than or different from the whole interest of Shyam Peary as a Hindu mother in her sons' estate. That interest was the interest of a limited owner and is quite correctly

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and naturally described as a right of enjoyment according to the sastras. Her suit of 1883 and the fact that the transaction of 1877 has been acted on by herself and to her knowledge by her sons and their representatives for many years is more than sufficient evidence of her having understood the transaction. It has been suggested by learned counsel that her actings upon her deed do not show that she appreciated that she was parting with more than a life interest in the English sense, but as she took and enforced a charge upon the whole interest of Sashi Mohan for her monthly allowance, the suggestion cannot be accepted.

Even so, however, it is necessary to consider whether the instruments of 1877 effect or evidence such a relinquishment by a Hindu woman of her right to succeed as heiress under the Dayabhaga as would in law accelerate the falling in of the reversion to the estate of the last full owner. If the benefit of the transaction was intended by her to accrue to Mohini Mohan alone, then it could not have this effect; and if in law it has to be regarded as a transfer to all four of the brothers so as to depend for its effectiveness upon their acceptance and consent the respondents might be in some difficulty upon the evidence. In the High Court Mitter, J., referred to the judgment delivered by Viscount Cave on behalf of the Board in the case of *Bhagwat Koer* v. *Dhanukhdhari Prashad Singh*[1], wherein the law was expounded and applied as follows:

The power of a Hindu widow to surrender or relinquish her interest in her husband's estate in favour of the nearest reversioner at the time has often been considered and was fully dealt with by the Board in the recent case of *Rangasami Gounden* v. *Nachiappa Gounden*[2]. As pointed out in that case, it is settled by long practice and confirmed by a series of decisions that a Hindu widow can renounce the estate in favour of the nearest reversioner, and by a voluntary act efface herself from the succession as effectively as if she had then died. This voluntary self-effacement is sometimes referred to as a surrender, sometimes as a relinquishment or abandonment of her rights; and it may be effected by any process having that effect, provided that there is a *bona fide* and total renunciation of the widow's right to hold the property. In the present case there was indeed no formal surrender by the widow of her estate; but there was an express agreement, binding upon her, that for considerations which appeared to her sufficient she would abandon the claim which at the time she had a good right to make and would have no right, claim or demand in respect of the estate of her late husband. It is true that the documents were drawn up on the footing, not of a surrender of an acknowledged right, but of an admission that the right did not exist; but in substance, and disregarding the form, there was a complete self-effacement

1. (1919) 37 M.L.J. 513: L.R. 46 I.A. 259 at 270-1: I.L.R. 47 Cal. 466 (P.C.).
2. (1918) 36 M.L.J. 493: L.R. 46 I.A. 72. I.L.R. 42 Mad. 523 (P.C.).

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by the widow which precluded her from asserting any further claim to the estate.

Again, in *Vytla Sitanna v. Marivada Virannai*[1], where the question was whether a widow could relinquish in favour of a daughter, it is pointedly observed in the judgment delivered by Sir John Wallis:

> "But though the doctrine of surrender by a widow has undergone considerable development in recent years, it must be remembered that the basis of it is the effacement of the widow's interest, and not the *ex facie* transfer by which such effacement is brought about. The result is merely that the next heir of the husband steps into the succession in the widow's place."

Applying these principles to the present case, their Lordships are not of opinion that the transaction of 1877 fails to operate as a relinquishment for want of proof of acceptance and consent by all the reversioners, but they find it necessary to construe the instruments of 29th September, 1877, to see whether the "release" was intended to benefit one only, or some only, of the persons who were at that time the nearest reversioners. They do not so interpret the transaction; they agree with the High Court that the release was intended as operative in favour of all, and that this is the true construction of the *nadabinama*. It is also the construction acted upon by all the parties concerned. The mere circumstance that of these two documents the one executed by Shyam Peary was addressed to Mohini Mohan and *vice versa* is explained by the fact that he was *karta* of the family.

The only remaining objection to the transaction being treated as a relinquishment is based on the monthly allowance (*mashahara*) of Rs. 150. It is said that this word does not mean "maintenance" and that it was not given to Shyam Peary for maintenance. Stress is laid on the fact that Madhusudan had in his will provided for her residence and maintenance, and it is said that in the circumstances the allowance was either not required for maintenance or exceeded what was required for that purpose. It will be noted that in the *ekrarnama* executed by Mohini Mohan the covenant for payment of the monthly sum was introduced by a recital which refers to the provision for maintenance in Madhusudan's will. It may well be that Shyam Peary did not out of the sum of Rs. 150 have to provide herself with a place of residence or her daily food. On that

1. (1934) 67 M.L.J. 20: L.R. 61 I.A. 200 at 207-8: I.L.R. 57 Mad. 749 (P.C.).

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point and on the question whether she had before September, 1877, been in receipt of any money as maintenance from her husband's estate, evidence is lacking. But the learned Judges of the High Court have held that in all the circumstances the allowance was no more than was proper, and they have taken fully into their consideration the position in life of her husband and the size of the estate left by her son Sashi Mohan. Their Lordships would in any case be slow to interfere with their decision upon such a question [*Sm. Nittokissoree Dossee* v. *Jogendro Nauth Mullick*[1] and *Ekradeshwari Bahuasin* v. *Homeshwar Singh*[2]] and they find no reason for doubting its correctness. The provisions of her husband's will would not have enabled her to get an excessive amount of maintenance. The fact that the allowance was described as *mashahara* does not in their Lordships' view cast any doubt upon its having been granted for the purpose of maintenance and they consider that the surrender made by her was a *bona fide* surrender of the whole estate and not a mere arrangement for dividing it with the reversioners.

They will humbly advise His Majesty that this appeal should be dismissed. The appellants must pay the costs of the first respondent, who alone appeared.

Solicitors for Appellants: *Stanley, Johnson & Allen.*

Solicitors for Respondents: *Hy. S.L. Polak & Co.*

R.C.C. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW.

G. J. Joseph .. *Petitioner** (*Accused*).

Joseph, *In re.*

Indian Penal Code (XLV of 1860), Ss. 84 and 406—Person charged with criminal misappropriation—Defence of unsound state of mind during the period in question—Evidence proving the accused being in an abnormal state of mind—Criminal intention not existing—S. 84 not applicable.

Where the petitioner (accused) was convicted under S. 406, Indian Penal Code, with having misappropriated criminally certain moneys in the discharge of his duties as a Head Clerk of the Sub-Divisional Magistrate's Court, but the defence was that the petitioner was practically insane during the period in question and the evidence proved that he was certainly not in a normal state of mind,

1. (1878) L.R. 5 I.A. 55, 56 (P.C.).
2. (1929) 57 M.L.J. 50: L.R. 56 I.A. 182, 185: I.L.R. 8 Pat. 840 (P.C.).

* Crl. R.C. No. 666 of 1938 and Crl. R. P. No. 634 of 1938. 11th January, 1939.

Joseph, *In re.*

Held, that from the evidence which was full and cogent in the case, the conclusion was that the petitioner should have been really unable to form the criminal intention that was attributed to him. He was in such a mental condition that he could not have understood that what he was doing was wrongful at that time. Unsoundness of mind have been such that in respect of certain acts the accused committing them would be incapable of knowing the nature of what he was doing while in the case of other acts he might have knowledge of their character.

S. 84, Indian Penal Code, does not cover a case like the present one where what it alleged is an inherent defect of the mind which is of greater significance because such infirmity of the mind is more likely to prevent the formation of that intention which is required by the law to be established as part of the offence charged.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of Session of the Trichinopoly Division in C. A. No. 10 of 1938 preferred against the judgment of the Court of the Sub-Divisional Magistrate, Musiri, in C. C. No. 67 of 1937.

K. S. Jayarama Aiyar for Petitioner.

The Public Prosecutor on behalf of the Crown.

The Court made the following

ORDER.—This is a petition to revise the judgment of the Sessions Judge, Trichinopoly, dated 20th April, 1938, dismissing the appeal preferred by the petitioner from his conviction under S. 406, Indian Penal Code, by the Sub-Divisional Magistrate, Musiri. The petitioner was the Head Clerk of the Sub-Magistrate's Court at Kulitalai and the charge against him was that he committed criminal breach of trust in respect of an aggregate sum of Rs. 112 made up of four separate items ranging in date from 6th April to 4th May, 1937. The amounts in question were fines received by the petitioner as Head Clerk from parties and the receipt of these sums is not denied. It is also stated that ultimately the whole of the amount was made good by the petitioner's wife and another. The principal defence in the case was that there was no criminal misappropriation, stress being laid on the adjective "criminal". It is unnecessary to deal at length with the contention that there was no misappropriation at all because the facts established are sufficient to support the inference that these monies must have been spent for the private purposes of the petitioner in order to gratify his own unregulated desires. The substance of the defence was that the petitioner was practically insane during the period in question; and that he was generally subject to fits of insanity

Joseph, *In re.*

during summer months when he behaved almost like a mad man, being violent in his conduct, disrespectful and threatening to his superiors and so on. The evidence as regards the petitioner's conduct, during the summer in question establishes beyond doubt that he was certainly not in a normal state of mind. So far is conceded on behalf of the Crown. The question is whether the petitioner's state of mind was such that it amounted to unsoundness of mind of such a degree that he was incapable of knowing the nature of his acts or that he was doing what was either wrong or contrary to law, or, in other words, whether the general exception contained in S. 84, Indian Penal Code, applies to the petitioner. This question was considered by both the Courts below and they were of opinion that though the petitioner was, so to say, not in a normal state of mind and was behaving like a mad man, nevertheless his case would not be covered by S. 84, Indian Penal Code. The Courts below, however, failed to consider another aspect of the case, namely, whether even if S. 84 did not cover the case, the state of mind in which the petitioner was did not exclude the existence of a dishonest intention which is an essential ingredient of the offence of criminal breach of trust. Evidence is certainly relevant for the purpose of ascertaining whether the petitioner's state of mind rendered it possible or likely for him to have entertained a dishonest intention when he dealt with the monies entrusted to him. As was observed in the *Director of Public Prosecutions* v. *Beard*[1], by Lord Birkenhead, L.C., where a specific intent is an essential element in the offence, evidence of a state of drunkenness rendering the accused incapable of forming such an intent should be taken into consideration in order to determine whether he had in fact formed the intent necessary to constitute the particular crime. The case was no doubt one where drunkenness was put forward as a fact which negatived the existence of a criminal intention. But any other mental state can also be put forward with equal relevancy for the purpose of negativing the existence of the criminal intention which is an essential ingredient of the crime that is charged against the person in question. No doubt S. 86, Indian Penal Code, appears to speak in a different way from the law as laid down by the House of Lords in *Director of Public Prosecutions* v. *Beard*[1]. But that is so only so far as knowledge goes and does

1. (1920) A.C. 479 at 499.

Joseph, *In re.*

not include intention. That section provides that where a particular knowledge or intent is a necessary ingredient of an offence, a person who does the act in a state of intoxication shall be liable to be dealt with as if he had the same knowledge as he would have had, had he been not intoxicated, unless he was intoxicated as the result of something being administered to him against his will or without his knowledge. It will thus be seen that the latter part of the section carefully omits the word "intention" and there would be no justification for attributing to the person the same intent which he would have had if he had not been intoxicated, though the same knowledge could be imported to him under the section. This section moreover applies only to cases of intoxication and does not cover a case like the present where what is alleged is an inherent defect or infirmity of mind which is of greater significance because such infirmity or disease of mind is more likely to prevent the formation of that intention which is required by the law to be established as a part of the offence charged. In this case the evidence is so full and so cogent that I find it impossible to resist the conclusion that the petitioner must have been really unable to form the criminal intention that is attributed to him by the prosecution, namely, of causing wrongful loss or wrongful gain. He was in such a mental condition that he could not have understood that what he was doing was wrongful at the time. There is indeed a good deal to be said in support of the view that the case is really covered by S. 84, Indian Penal Code. Unsoundness of mind need not necessarily make a person incapable of understanding the nature of all his acts. There are some forms of unsoundness of mind which seem to affect only particular acts. In other words, unsoundness of mind may be such that in respect of certain acts the person committing them is incapable of knowing the nature of what he is doing while in the case of other acts he might have knowledge of their character. It cannot therefore be said that because the man was allowed to continue in office while he was in this state of mind, his mind must have been sufficiently sound to enable him to know that what he was doing was wrong or contrary to law. The fact seems to be that the petitioner in his unsound state of mind thought that he was in a way a representative of the Crown to whom the money belonged and that he could do what he liked with it for the purpose of making presents

to children and dressing himself up in velvet and so on, the period of the alleged misappropriation having synchronised with the celebration of the Coronation. It is unfortunate that no alienist was asked in the present case to give expert evidence as to the inferences that could be drawn from the facts and circumstances elicited in the evidence about the petitioner's state of mind. But with the evidence, as it stands, I have little doubt that criminal intention has not only been not proved but is practically excluded by such evidence as has been adduced regarding the petitioner's state of mind during the period when the misappropriation took place. The misappropriation cannot therefore be regarded as criminal and the conviction of the petitioner and the order requiring him to give security for his good behaviour are set aside and he is acquitted.

K.C. ——— *Conviction set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW.

Avanashi Goundan and others .. *Petitioners* (Accused 1 to 6, 8, 9 and 11)*

v.

Palani Madari .. *Respondent (Complainant).*

Indian Penal Code (XLV of 1860), S. 149—Persons tried for rioting and forming unlawful assembly with a common object—Facts found disproving common object—Joint trial and conviction for individual acts—Procedure wrong—Joint trial prejudicial after finding of lack of common unlawful object for the assembly.

Where the head and front of the offences charged against the petitioners (accused) was the rioting or rather the forming of an unlawful assembly with an unlawful common object and the doing of various acts in prosecution of that common object, but the trial Court itself found that the common object had not been established and therefore the petitioners were acquitted of the offence punishable under S. 148, Indian Penal Code, and they had been convicted only in respect of individual acts said to have been committed by them which were alleged to constitute offences under various sections of the Penal Code such as Ss. 352, 323, 324 and 325,

Held, that there was no justification for a joint trial, once it was found that the common unlawful object had not been established. The petitioners would be prejudiced by a joint trial. Hence the conviction and sentences passed after a trial not in accordance with law could not be sustained.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Additional Sessions Judge of the Court of Session

* Crl. R.C. No. 468 of 1938. 10th January, 1939.
Crl. R.P. No. 444 of 1938.

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of the Coimbatore Division dated 14th March, 1938 and passed in Criminal Appeal No. 11 of 1938 preferred against the judgment of the Sub-Divisional Magistrate of Erode in C.C. No. 103 of 1937.

K. S. Jayarama Aiyar and *K. Umamaheswaran* for Petitioners.

N. Somasundaram for Respondent.

The Public Prosecutor for the Crown.

The Court made the following

ORDER.—This is a petition to revise the judgment of the Additional Sessions Judge of Coimbatore dated the 14th day of March, 1938, dismissing the appeal preferred by the petitioners from their convictions and sentences under various sections of the Penal Code. The charges framed against the petitioners who are nine in number and two others were briefly as follows:—that they were members of an unlawful assembly on the 14th September, 1937, at Chinna Puthur and did, in prosecution of the common object of such assembly, namely, to assault and cause hurt to the chucklers of the village, commit the offence of rioting and that in prosecution of the common object certain individual members of that assembly committed certain individual acts and finally that all the accused eleven in number have thus under S. 149 of the Indian Penal Code committed offences punishable under Ss. 148, 352, 323, 324 and 325 of the Indian Penal Code. It is clear that the charge which the petitioners were called upon to meet in the trial Court was that they were members of an unlawful assembly which had a common unlawful object and that as in the prosecution of that common object, various acts were committed by different individuals among the members of that assembly, all of them were liable by virtue of S. 149, Indian Penal Code, in respect of all the acts committed by the various individuals. It is thus clear that the head and front of the offences charged against them was the rioting or rather the forming of an unlawful assembly with an unlawful common object and the doing of various acts in prosecution of that common object. The trial Court itself found that the common object had not been established and therefore the petitioners were acquitted of the offence punishable under S. 148, Indian Penal Code and they have been convicted only in respect of individual acts said to have been committed by them which are alleged to constitute offences under various sections of the

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Penal Code such as Ss. 352, 323, 324 and 325. Once it is found that a common object has not been established, it must be held that the acts which were alleged to constitute these offences had nothing in common between them, and there would be no justification for a joint trial being held in respect of such acts as against different accused. The acts were committed not only by different accused but against different persons, and it would appear, in different places—in all probability in the houses of the various persons who were injured. There was thus no justification for the joint trial once it was found that the common unlawful object had not been established, and I have no doubt that apart from the improper character of the joint trial, the petitioners must have been really prejudiced in their defence by the joint trial; they must throughout have been concentrating their efforts on meeting the prosecution case that there was an unlawful assembly with an unlawful common object and they could not have anticipated that even if they succeeded in showing that the prosecution had not established the substance of their case, namely, that there was an unlawful assembly with an unlawful common object, nevertheless they would be convicted in respect of individual acts in the same trial. I am therefore of opinion that the convictions and sentences passed on the petitioners after a trial which was not held in accordance with law cannot be sustained. They are therefore set aside and there must be separate retrials of the petitioners in respect of their alleged individual acts before a competent Magistrate to be selected by the District Magistrate. The fines, if paid, should be refunded to the petitioners from whom they have been collected.

Conviction set aside and remand for retrial.

K. C.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VARADACHARIAR AND MR. JUSTICE ABDUR RAHMAN.

Ninkileri Lakshmikutty Kettilamma .. *Appellant** (*3rd Respondent*)

v.

Thekka Madathil Vishnu Nambisan .. *Respondent* (*Petitioner*).

Lakshmikutty Kettilamma v. Vishnu Nambisan.

Insurance policy—Assignment of—To wife with a provision for reverter to assignor in certain contingencies—If a present assignment—Creditor of

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* A. A. A. O. No. 56 of 1935. 8th December, 1938.

Lakshmi-kutty Kettilamma v. Vishnu-Nambisan.

assured if can attach the amount on death of assured as assets left by him—Transfer of Property Act, S. 130—Absolute assignment—Meaning of.

An assured under an endowment policy assigned the policy to his wife in the following terms: " . . . . . I do hereby assign the benefit of all moneys to become payable under the policy . . . . (reserving to myself the right to receive in cash or apply in reduction of premia any bonuses that may be declared upon such policy from time to time) to my wife . . . . . Provided however that in the event of my wife predeceasing me or in the event of my surviving the date on which the said policy . . . . would mature, the benefit of the policy and the right to receive moneys thereunder shall revert to me as if this assignment has not been made."

The assured died leaving behind the assignee (his widow). A creditor of the assured attached the insurance amount as 'assets' of the deceased.

Held, that the insurance amount was not an asset left by the deceased. The assignment operated as a present transfer in favour of the assignee with a provision for reverter to the assignor, in certain contingencies. It was therefore not a mere mandate to transfer nor a testamentary assignment and as such the assured had no interest in it at his death so as to become an asset left by him. The bonus stood on a different footing.

Held, further, that as the dispute was not as to the transferee's right to sue the Insurance Company, the question if this was an absolute transfer or not within the meaning of S. 130, Transfer of Property Act, did not arise and that even otherwise it was an absolute assignment as there is no possibility of the assignor and assignee having fractional shares at one and the same time.

Appeal against the order of the District Court of North Malabar at Tellicherry dated 24th September, 1934 and made in A. S. No. 111 of 1934 preferred against the order of the Court of the District Munsif of Kuthuparamba in R. E. P. No. 791 of 1933 (Summary Suit No. 544 of 1933, District Munsif's Court, Cannanore).

O. T. G. Nambiar and *N. T. K. Nambiar* for Appellant.

P. Govinda Menon for Respondent.

The judgment of the Court was delivered by

Varada-chariar, J.

Varadachariar, J.—The only question for decision in this Miscellaneous Appeal is whether certain insurance policy amount which has been sought to be attached by the respondent decree-holder can be held to be "assets" of the late Kerala Varma Raja in the hands of the appellant.

The appellant is the widow of Kerala Varma Raja. The policy in question was an endowment policy obtained by the deceased in 1927 and was payable on the 5th April, 1952, or on the death of the assured earlier. On the 3rd July, 1933, the assured assigned this policy by an endorsement on the policy itself. This assignment was duly communicated to the insurance

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company and there registered, though as usual the company guarded itself from admitting the validity of the assignment. The assured died in 1933 and the decree under execution was passed against the appellant as his legal representative. The question does not now arise between the company and the assignee but between the assignee and a person who has obtained a decree against the assets of the assured.

The Court of first instance released the policy amount from attachment on the ground that by reason of the assignment the policy amount belonged to the assignee and did not form part of the estate of the assured at his death. The learned District Judge reversed this decision on the ground that the assignment was not an absolute or outright assignment taking effect at once but was only contingent; he thought it followed that the amount due to the assured under the policy formed part of the estate of the deceased. The decision of the learned District Judge is opposed to the judgment of this Court in *Yacoob Sahib* v. *Pacha Bibi*[1]. The only other reported decision on the point which has been brought to our notice is a decision of the Sind Judicial Commissioner's Court in *Shamdas* v. *Savitribai*[2] and the principle of that decision is also in favour of the appellants' contention.

Learned Counsel for the respondent has contended that the endorsement on the policy is no more than a mandate or at best it operates only as a testamentary transfer and that no interest in the policy passed to the assignee during the lifetime of the assignor. He also repeated the argument which had found favour with the lower Court that the words of transfer did not amount to an absolute interest. The endorsement, which appears in a usual form suggested by the company, runs as follows:—

"In consideration of natural love and affection, I do hereby assign the benefit of all moneys to become payable under the policy (reserving to myself the right to receive in cash or apply in reduction of premia any bonuses that may be declared upon such policy from time to time) to my wife and declare that her receipt shall be a sufficient discharge to the company for the same, provided however that in the event of my wife predeceasing me or in the event of my surviving the date on which the said policy, if so expressed, would mature, the benefit of the policy and the right to receive moneys thereunder shall revert to me as if this assignment has not been made."

In support of the first contention, respondent's learned Counsel relied upon the judgment of the Court of Appeal in

1. (1915) 38 I.C. 248.   2. A.I.R. 1937 Sind 181.

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England in In re *Williams*: *Williams* v. *Ball*[1] and on some observations of the Rangoon High Court in *Ma Nu* v. *Ma Gun*[2]. The language of the document which the Court had to construe in the English case was quite different. The very point made in that connection in the English case was that the endorsement relied on did not purport to *assign* at all but only purported to authorise the named person to draw the insurance amount in the event of the assured predeceasing her. It was significant that no notice of the so-called assignment had even been given to the insurance company in that case. Astbury, J., held that there were no present words of gift at all. In the Court of Appeal, the learned Judges were inclined to construe the so-called endorsement as a mere power-of-attorney. Alternatively, they added that at best it might have operated to give to the named person an interest on the death of the assured if it had complied with the formalities required by law for a will. No help can be derived from that judgment in the construction of the terms of the endorsement in the present case, because the words here used are that the assured doth "hereby assign the benefit of all money, etc., to the wife". On these words it cannot be said that the endorsement amounted to a mere power-of-attorney or that the transfer was one *in futuro*. In the Rangoon case, *Ma Nu* v. *Ma Gun*[2], the argument turned on the effect of a mere *nomination*. Reliance was placed by learned Counsel before us on the way that the observations in In re *Williams*: *Williams* v. *Ball*[1], had been understood by the learned Judges of the Rangoon High Court. As we have dealt with the English case ourselves, the observations of the Rangoon High Court on that case cannot carry the matter further.

It was next argued that because in certain contingencies the assignee will not on the terms of the endorsement be entitled to receive the policy amount or the assignor might become entitled to recover the same, the transaction was only revocable and in that sense the disposition if any was only testamentary. This argument seems to us to confound a contingent transfer with a revocable transfer. Even this distinction is immaterial here, because on its true construction the endorsement in this

1. (1917) 1 Ch. 1.

2. (1924) I.L.R. 2 Rang. 388.

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case operates in our opinion as a *present* transfer in favour of the assignee, though provision has also been made for a reverter to the assignor, in certain contingencies. The provision for *reverter* only emphasises the immediate operativeness of the transfer. If the events that have happened have brought the reverter clause into operation, the creditors of the assured would no doubt be entitled to treat the policy amount as having become part of the estate of the assured. But it cannot be disputed that in the events that have happened the assignee is entitled to recover the policy amount and there is no scope for the operation of the reverter clause.

It was finally contended that an assignment of an actionable claim within the meaning of S. 130 of the Transfer of Property Act must be "absolute" and that the assignment in the present case is not absolute. Reliance was placed in this connection on the observations of Beaman, J., in *Haridas Lalji* v. *Narotam Raghavji*[1]. The learned Judge has not expressed any final opinion on this point, in the case referred to. The question of the 'absolute' character of the transfer may be material when there is a dispute as to the transferee's right to sue the insurance company, no such question arises here. We may however observe that there is no possibility in this case, of the assignor and the assignee having fractional rights in the policy amount *at one and the same time*. The only qualification on the rights of the transferee (apart from the bonus amount with which we are not now concerned) is by way of a defeasance clause (*cf.* S. 31 of the Transfer of Property Act and S. 134 of the Succession Act). The result is that so long as the transferee's interest exists, she has the whole interest and when the defeasance clause comes into operation the interest of the person who takes under the defeasance clause is equally an absolute interest. We do not find anything in the terms of S. 130 of the Transfer of Property Act or in the principle underlying it that excludes a transfer of this kind from its scope.

As desired by Mr. Govinda Menon, the learned Counsel for the respondent, we wish to make it clear that this judgment will not apply to any amount that the deceased might be entitled to receive by way of bonus in respect of the policy, because the endorsement expressly reserves to the assignor the right to the

1. (1911) 14 Bom. L.R. 237 at 245.

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bonus, so that he may, if he so desired, apply it in reduction of the premia. If the bonus has been appropriated by the assured himself towards the premia due on the policy, there will be nothing left for the assured or his creditors to claim. If on the other hand there is any sum remaining payable by way of bonus, that cannot be held to have passed under the assignment.

We set aside the decision of the learned District Judge and restore that of the District Munsif with costs here and in the Court below.

K.C. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG RAO.

Krishna Aiyar .. *Petitioner* (Accused).*

Krishna Aiyar, *In re.*

Madras Prevention of Adulteration Act (III of 1918), S. 5 (1) (d)—Milk certified as below the minimum in quality prescribed by Government—Assumption of buffalo's milk—As cow's milk quality not below standard—Conviction wrong.

Where the petitioner was charged with having sold milk below the standard of purity prescribed by Government, but the charge did not state whether it was buffalo's milk or cow's milk that was said to have been sold by him contrary to law, and the certificate of analysis was obviously based on the assumption that the milk that was sold was sold as buffalo's milk,

Held, that the sample in respect of which the offence was said to have been committed should be dealt with as if it were cow's milk that was offered for sale or sold, and since from the sample it could not be said that as cow's milk the sample was below the prescribed standard, the offence had not been established and hence the conviction and sentence should be set aside.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Sub-Divisional Magistrate of Vellore in Criminal Appeal No. 13 of 1938 preferred against the judgment of the Court of the Second Class Magistrate, Vellore, in C. C. No. 247 of 1938.

V. Rajagopala Mudaliar for Petitioner.

K. Venkataragavachari for *The Public Prosecutor* for the Crown.

The Court made the following

ORDER.—The petitioner has been convicted of an offence punishable under S. 5, cl. 1 (*d*) of the Madras Prevention of

* Crl. R.C No. 673 of 1938. 6th January, 1939.
Crl. R.P. No. 641 of 1938.

Krishna Aiyar, *In re.*

Adulteration Act III of 1918. The charge is that he sold milk below the standard of purity prescribed by Government. The charge that was framed against the accused did not state whether it was buffalo's milk or cow's milk that was said to have been sold by him contrary to law. The certificate of analysis in this case by the Government Analyst is to the effect that the sample contained 60·5 parts of genuine milk, 35·0 parts of added water and 4·5 parts of cane sugar in a total of 100 parts. But this opinion as to the composition of the sample was based according to the certificate on the fact that the sample contained only 3·4 per cent. milk fat and only 0·321 per cent. nitrogen and 4·5 per cent. cane sugar whereas it is laid down in G.O. No. 1867 P.H. dated 1st September, 1932, that genuine buffalo milk contains at least 4·5 per cent. milk fat and at least 0·53 per cent. nitrogen. It is obvious therefore that this opinion was based on the assumption that the milk that was sent as sample, that is, the milk that was sold by the petitioner, was sold as buffalo's milk. There is no basis for this assumption that it was buffalo's milk that was sold. The evidence of the Sanitary Inspector is also to the effect that he merely asked for a cup of milk and it was given to him. He does not say that he asked for any particular kind of milk, cow's or buffalo's. R. 22 of the rules framed under S. 20 of the Act by the Government provides that:

> "Where milk is sold or offered for sale without any indication as to whether it is derived from the cow or the buffalo, the provisions of rr. 16, 17 and 18 shall apply thereto in all respects as if it were cow's milk sold or offered for sale."

It is therefore clear in this case that the sample in respect of which the offence is said to have been committed must be dealt with as if it were cow's milk that was offered for sale or sold. The minimum percentage of milk fat is only 3 per cent. under r. 16. The sample contained 3·4 per cent. milk fat. It cannot therefore be said that the sample was below the minimum prescribed so far as milk fat is concerned. It is contended, but there is no evidence to show, that the quantity of solid found in the sample was below the prescribed minimum. R. 18 does not seem to apply to this case in view of the note that is found below r. 21. In these circumstances it must be held that the offence has not been established in view of the analysis which is relied upon by the prosecution. The conviction and

Krishna Aiyar, *In re.*

the sentence imposed upon the petitioner are therefore set aside and he is acquitted and the fine if paid must be refunded to him.

K. C. —— *Conviction set aside.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE WADSWORTH AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

Panangipalli Suryanarayanacharyulu .. *Petitioner**

v.

Ravi Narasimhaswamy and others .. *Respondents.*

F.B.

Suryanarayanacharyulu *v.* Narasimhaswamy.

Court Fees Act (VII of 1870), Ss 7 (v) and 7(x)(c)—Registered lease of property—Lessee suing for possession and mesne profits—Strangers in possession of property sued—Plaint stamped as for specific performance under S. 7 (x) (c)—Whether court-fees paid correct.

In a suit by the first respondent against the petitioner and other defendants for possession of suit property and for mesne profits, he based his claim on a contract of lease duly executed and registered and averred in his plaint that the petitioner in collusion with the other defendants in the suit had parted possession of the same property to them and hence treated his suit as one for specific performance of the contract of lease and stamped his claim on one year's rent under the provisions of S. 7 (x) (c) of the Court-Fees Act, on the question whether it was in substance a suit for specific performance and properly stamped,

Held, the suit was in substance one for possession and mesne profits against strangers to the contract, who, according to the plaintiff, were unlawfully withholding possession from him, and hence the petition should be allowed and the plaint returned to the first respondent for being properly stamped under provisions of S. 7 (v) of the Court-Fees Act.

The correctness of *Sundara Ramanujam Naidu* v. *Sivalingam Pillai*, (1923) 45 M.L J. 431: I.L.R. 47 Mad. 150, need not be gone into as the question arising on facts here is different and can be distinguished.

Petition under S. 115 of Act V of 1908 and S. 107 of the Government of India Act, praying the High Court to revise the order of the Court of the District Munsif of Razole dated 7th August, 1936, and made in O.S. No. 200 of 1935.

V. Subramaniam and *V. Satyanarayana* for Petitioner.

V. Parthasarathi for Respondents.

The Court delivered the following

JUDGMENT.—This matter arises out of a suit filed by the first respondent in the Court of the District Munsif of Razole

* C.R.P. No. 1286 of 1936. 29th November, 1938.

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Surya-
narayana-
charyulu
v.
Narasimha-
swamy.

for specific performance of a contract of lease entered into with the petitioner, for possession of the properties, and for the recovery of mesne profits. The property in suit had belonged to the petitioner's father who in May, 1913, granted a lease of it for twenty years to the second and third respondents and to the fathers of the fourth, fifth and sixth respondents. The lessor died sometimes before 1929 and the property devolved on the petitioner. On the 2nd November, 1929, the petitioner granted a lease of the properties to the first respondent for twenty years, the period to commence from 2nd June, 1935. A deed of lease was drawn up, duly executed and registered. The first respondent averred in his plaint that the petitioner had in collusion with the other defendants (respondents 2 to 15 and one Malay Venkataratnam, the fifteenth defendant) put the defendants into possession of the property and had refused his demand for possession. He treated the suit as being one for specific performance of the contract of lease and stamped his plaint on the amount of one year's rent under the provisions of S. 7 (*x*) (*c*) of the Court-Fees Act. The petitioner contended that the suit was really one for possession and that it should be stamped in accordance with the provisions of S. 7 (*v*) of the Act, that is, on the value of the property leased. The value which the first respondent had placed on the property in suit was Rs. 2,000. The District Munsif held an inquiry into the question of value and found that the property was worth not less than Rs. 8,000. This finding has not been challenged. If the suit is to be regarded as one for possession and not as one for specific performance, it cannot be tried in the Court of the District Munsif. The Court having jurisdiction will be that of the Subordinate Judge. The District Munsif decided that the suit should be classified as a suit for specific performance and therefore held that it had been properly stamped. In coming to this conclusion he relied on the decision of this Court on *Sundara Ramanujam Naidu* v. *Sivalingam Pillai*[1]. The petitioner filed an application for revision of this order. The matter came before Varadachariar, J., who considered that observations in *Sundara Ramanujam Naidu* v. *Sivalingam Pillai*[1], did lend support for the conclusion arrived at by the District Munsif and referred the matter to a Bench. This Bench has been constituted to decide the question.

1. (1923) 45 M.L.J. 431 : I.L.R. 47 Mad. 150.

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Surya-narayana-charyulu *v.* Narasimha-swamy.

In *Sundara Ramanujam Naidu* v. *Sivalingam Pillai*[1], Krishnan and Venkatasubba Rao, JJ., held that a suit to compel the defendant to execute a sale deed in pursuance of an agreement for sale was a suit for specific performance within the meaning of S. 7(*x*) (*c*) of the Court-Fees Act and did not become a suit for possession by reason of the addition of a prayer for possession. In the course of his judgment Krishnan, J., observed:

> "The delivery of possession is a part of the specific performance of a contract of sale unless the terms thereof show that the vendee was not under an obligation to deliver possession. The claim for delivery of possession is as much a part of specific performance as the claim for the payment of the price is, when the seller brings the suit for specific performance"

He also observed that when the prayer for possession was allowed to be added the suit did not cease to be one for specific performance and become a suit for possession or combination of both suits—under the Court-Fees Act. In that case there was only one defendant and there was no question of the property being in the possession of a stranger to the contract. The Allahabad High Court in *Muhi-ud-din Ahmad Khan* v. *Majlis Rai*[2] and *Nihal Singh* v. *Sewa Ram*[3], also held that a suit for specific performance carried with it the right to claim possession and in *Fakir Chand* v. *Ram Datt*[4], the Lahore High Court gave a decision to the same effect. On the other hand, the Calcutta High Court in *Madan Mohan Singh* v. *Gaja Prasad Singh*[5], came to a contrary conclusion. In that case Mookerjee and Caspersz, JJ., held that where in a suit for specific performance a claim for possession is added the suit thereby becomes one in substance for possession of the property and should be valued under S. 7, cl. (*v*) of the Court-Fees Act.

It is not necessary for the purposes of this case to decide whether the opinion of Krishnan, J., in *Sundara Ramanujam Naidu* v. *Sivalingam Pillai*[1], which is shared by the Allahabad and Lahore High Courts is to be preferred to that expressed by the Calcutta High Court; nor is it necessary for us to discuss whether the observations of Krishnan, J., went too far, because it is quite clear that in the present case the suit is in substance one for possession and not for specific performance. The lease had been executed long before suit and according to the

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1. (1923) 45 M.L.J. 431: I.L.R 47 Mad. 150.
2. (1884) I.L.R. 6 All. 231.
3. (1916) I.L.R. 38 All. 292.
4. (1923) I.L.R. 5 Lah. 75.
5. (1911) 14 Cal.L.J. 159.

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first respondent he was compelled to bring the action because the petitioner had parted with possession to the other respondents. The suit is, therefore, one for possession against strangers to the contract, who according to the plaintiff are unlawfully withholding possession from him. The District Munsif was impressed by the fact that in his written statement the petitioner had said that the property was in his possession and that the other defendants were not in possession. This is a question of fact which will have to be tried in the suit, but for the purposes of the court-fee what the Court has to look at is the plaint. The plaint must be stamped according to the nature of the suit. The plaintiff formulates his claim and the court-fee must be paid according to the category in which the suit falls.

In the course of his argument the learned advocate for the first respondent laid great stress on the provisions of S. 27 of the Specific Relief Act. That section states that except as otherwise provided by Chapter II of the Act specific performance of a contract may be enforced against other party thereto and any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract. In this case defendants 2 to 16 are not, according to the plaint, persons claiming under the first respondent, but persons who have been put in possession of the property in collusion with the petitioner in order to defeat the first respondent.

The petition must, therefore, be allowed and the plaint returned to the first respondent for presentation to the Court having jurisdiction after being stamped with the proper fee. The petitioner is entitled to his costs.

K.C. —— *Petition allowed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE WADSWORTH AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

Mada Nagaratnam .. *Plaintiff**

v.

Puvvada Seshayya and another .. *Defendants.*

In re The Madras Agriculturists' Relief Act.

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Mada Nagaratnam *v.* Puvvada Seshayya.

Madras Agriculturists' Relief Act (Madras Act IV of 1938)—Constitutional validity—If within powers of Provincial Legislature—Repugnancy to Negotiable Instruments Act and Usurious Loans Act—Effect—Conflict with Hindu law obligations—Effect.

The Madras Agriculturists' Relief Act was passed for the relief of indebted agriculturists in the province. The Act provides for the scaling down of debts and interest due from agriculturists and for remission of arrears of rent. The references raised the question whether the provisions of the Act relating to scaling down of debts and interests due on promissory notes and negotiable instruments are *ultra vires* the powers of the Provincial Legislature in that these provisions are repugnant to the provisions of the Negotiable Instruments Act, the Usurious Loans Act and provisions of Hindu law as to debts.

Held, in one aspect and for one purpose a subject may be within the powers of the Federal Parliament while in another aspect and for another purpose it may fall within the powers of a Provincial Legislature.

The Agriculturists' Relief Act is one which relates to "*agriculture*" a subject reserved for the Provincial Legislature. The Act relates to money-lending to agriculturists and "*money-lending*" also is a subject reserved for Provincial Legislature.

So far as negotiable instruments are concerned, the only effect of Agriculturists' Relief Act is to reduce liability where the maker or endorser is an agriculturist. The Agriculturists' Act being in substance within the powers of Madras Legislature, the fact that in particular cases it may operate to reduce liability on contracts evidenced by negotiable instruments cannot affect its validity. So too its affecting discretion given to Courts by Usurious Loans Act cannot affect its validity.

Even if the matters dealt with under the Agriculturists' Act do not come within the exclusive powers of the Provincial Legislature, the Act can be supported on the ground that it relates to "contracts" falling within the concurrent Legislative List. The Act having been reserved for consideration of the Governor-General and received his assent under S. 107, Government of India Act, its provisions must prevail in the province unless and until the Federal Legislature thinks fit to legislate in respect of the same matter.

The Provincial Legislature has power to legislate with regard to "contract" and no exception is made in regard to contracts entered into by Hindus. There is no "Federal" or "existing Indian Law" which stands in

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* Refd. Cases Nos. 7, 8 and 9 of 1938. 7th February, 1939.

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the way, and even if there were the sanction of the Governor-General under S. 107 (2) of the Government of India Act would remove it. The manager of a joint Hindu family is in the position of an agent and the Provincial Legislature ha under the concurrent Legislative List power to legislate with regard to "contracts."

So, the Madras Agriculturists' Relief Act is *intra vires* the powers of the Provincial Legislature.

Case-law under the British North America Act, 1867; Government of Ireland Act, 1920, discussed and applied.

Sadanand v. *Aman Khan*, (1938) 20 Pat.L.T. 1 (F.B.), considered but not discussed.

Case stated under Order 46, Rule 1 of Act V of 1908 by the District Munsif of Guntur in Small Cause Suit No 505 of 1908. The District Munsif of Guntur, the District Munsif of Cuddalore and the Subordinate Judge of Cocanada each referred to the High Court under O. 46, r. 1 of the Civil Procedure Code, the question with regard to the validity of the Madras Agriculturists' Relief Act, 1938.

The contentions on behalf of the Madras Government were:—

A

(*a*) The contention that Madras Act IV of 1938, in so far as it affects debts due under or secured by promissory notes is invalid, is unsustainable.

(*b*) The impugned enactment was reserved for the consideration of the Governor-General of India under the terms of S. 107 of the Government of India Act, 1935, and therefore is not open to attack on the ground that the provisions thereof are repugnant to the provisions of any existing Indian Law with respect to any matter in the Concurrent Legislative List.

(*c*) With due regard to the primary matter dealt with by the impugned enactment, its subject-matter and legislative character, its true nature, its leading features, its pith and substance, the impugned legislation as a whole is within the legislative competence of the Provincial Legislature as falling within item 27 of the Provincial Legislative List and also under item 20 of the same List.

(*d*) If, as it must be conceded, a general legislation as regards relief of debtors is within the competence of the Province, the fact that that legislation embraces within its scope debts due under or secured by promissory notes does not render the legislation one *with respect* to promissory notes, etc., falling within item 28 of the Federal Legislative List.

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(*e*) Consistently with principles of interpretation laid down by the Judicial Committee as regards the construction of Federal constitutions with enumerated powers, item 28 of the Federal Legislative List must be so read as not to detract from the plenary powers of the Provincial Legislature under item 27 of the Provincial List, especially as any other construction would defeat the main purpose underlying the grant of Legislative power to the Provinces under that item, as the bulk of the money-lending transactions in this country are secured by promissory notes, and the very object and purpose for the conferment of power under item 27 was to enable the Provinces to relieve the agriculturists from their growing indebtedness.

(*f*) The enactment in question is valid as falling also within item 10 of the Concurrent Legislative List.

(*g*) Even if it be that it is open to the Central or the Federal Legislature to include in a law relating to promissory notes a provision as to interest, it is submitted that until such a law is enacted and the field occupied, it is open to the Provincial Legislature to enact measures dealing with debts including those under promissory notes and interest due thereon.

B

(*a*) In any event the enforcement of the Hiudu Law obligation of a member or members of a joint family on the ground that a debt evidenced by a promissory note incurred by a manager or other person for family purpose cannct be treated as a part of the law relating to promissory notes falling within item 28 of the Federal Legislative List. The debt sought to be scaled in Application No. 1270 of 1930 falls under this class.

(*b*) In any event, where the debt due under or secured by a promissory note has merged in a decree and thus passed from the domain of contract into the domain of judgments, such decrees are within the legislative competence of the Provincial Legislature and do not any longer fall within item 28 of the Federal Legislative List.

(*c*) The provisions relating to decrees, their executability and in particular the inhibition on a decree-holder realizing amounts in excess of those permitted by the enactment as against land within the Province are also covered by item 21 of the Provincial Legislative List, read with item 4 of the Concurrent Legislative List.

(*d*) The prohibition against the holders of the decree realizing amounts in excess of those permitted by the enactment is within the powers of the Provincial Legislature also under item 4 of the Concurrent List read with item 8 of the same List.

The contentions on behalf of creditors were—

(*a*) Madras Act IV of 1938 cannot affect or modify claims or liabilities arising on promissory notes.

(*b*) Promissory notes are included in the Federal List item 28 and the Provincial Legislature has no power to legislate with respect to them.

(*c*) The Indian Negotiable Instruments Acts XXVI of 1881 and XXX of 1926 will continue to apply to claims on promissory notes until the Federal Legislat ure modifies the law of Negotiable Instruments.

(*d*) The pith and substance of the Madras Act IV of 1938 does not bring it under the topic of "Money-lending and Money-lenders" in item 27 of the Provincial List nor under "Agriculture", etc., in item 20 thereof.

(*e*) It may fall within item 10 of the Concurrent List but it must be read with, and so as to exclude, item 28 of the Federal List which is within the exclusive competence of the Federal Legislature,

(*f*) It cannot be conceded, broadly, that the relief of debtors is within the competence of the Provincial Legislature, or that under cover of any such legislation promissory notes can be affected. And to read the competence of the Provincial Legislature in the sense that it could affect the Law of Negotiable Instruments is to wipe out the Federal Law with respect to all the rights of parties under every promissory note—which will be a direct invasion of a sphere within the exclusive competence of the Federal Legislature.

(*g*) Reservation for the consideration of the Governor-General of India cannot cure the incomeptence of the Provincial Legislature.

(*h*) Interest on promissory notes and decrees thereon are also within the item 28 of the Federal List and are dealt with by the Negotiable Instruments Acts mentioned above. The field of interest is not unoccupied and in any case being within the exclusive competence of the Federal Legislature cannot be affected by Provincial Legislation. In any case this argument cannot affect the principal due under the promissory notes.

(*i*) If the claim on a promissory note cannot be affected or modified by Provincial Legi slation, neither can a decree passed on such claim be so affected or modified; it is a clear and unquestionable principle that what cannot be compassed directly cannot be compassed indirectly. Such a right, if it exists, will destroy the Federal control of all items within their exclusive competence which pass into decrees.

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(*j*) Neither item 4 nor item 8 of the Concurrent List can be used by the Provincial Legislature to defeat rights arising out of promissory notes before or after decree.

(*k*) Item 21 of the Provincial List has no connection with the matter under consideration and cannot stand in the way of the enforcement of promissory notes and decrees thereon.

(*l*) The liability of persons other than those who are signatories to the promissory notes, where the debt is borrowed for the benefit or necessity of the family is either on the promissory note or by reason of the maker's representative character; whichever view is taken, it is not within the competence of the Provincial Legislature as neither the Provincial nor the Concurrent List empowers such legislation. And no liability under the existing law can be modified except by legislation by a competent legislature. Moreover the Act does not relieve the junior members of an agriculturist joint Hindu family from the liability for which all the members are equally liable.

T. R. Venkatarama Sastri, (with K. S. Sankara Iyer, N. Sivaramakrishna Iyer, B. V. Ramanarasu and D. Narasa Raju) for the Creditors. The questions to be decided are:—

(*i*) Whether Act IV of 1938 embraces pronotes and remedies thereunder.

(*ii*) If a pronote merges in a decree has it passed out of the region of negotiable instruments and come within the power of the Provincial Legislature to alter the obligations?

(*iii*) If parties include joint family members in addition to the maker of the promissory note can legislature alter their liabilities?

(*iv*) If the decree or promissory note is not to be scaled down can legislature prevent its execution (against land except for the scaled down debt) to any extent?

In the present Government of India Act of 1935 a clear and definite demarcation of Federal and Provincial subjects has been made. Subjects in the Federal list cannot be legislated upon by the Provincial Legislature. *See* S. 100 (1) of the Government of India Act of 1935.

The Government of India Act provides five kinds of legislation:—

(1) Central legislation. (2) Provincial alone. (3) Concurrent. (4) Not covered by Provincial. (5) Alteration of existing law (S. 107).

By S. 292 existing laws stand and if they are to be interfered with it must be done under Ss. 99 to 107.

"Pronotes" is exclusively in the Federal list as Item 28 of the Federal list. This cannot be taken as "money-lending" or 'agriculture" or "contracts" and brought under second or third list.

Analysing the *Madras Agriculturists' Relief Act* (*IV of 1938*) we find S. 3 defines "Agriculturist". "Debt" means any liability. S. 4 excludes certain liability. Ss. 7, 8 and 9 deal with scaling down. S. 7 by implication would include negotiable instruments. S. 13 deals with future debts. We have to see whether the provisions of this Act vary the provisions of the Negotiable Instruments Act. [*See* S. 79 "interest" when specified. S. 80 when no rate specified. *See also* Ss. 82 and 32.]

A pronote is negotiable and the ultimate holder is entitled to realise the amounts under Negotiable Instruments Act from the maker and all the endorsees. Applying Act IV of 1938 the negotiability of the documents and liabilities of the parties will be altered. "Negotiable instruments" is included in the Federal list because negotiation takes place outside the provinces.

Chief Justice.—It affects International law merchant and commercial relations.

T. R. V. Sastri.—Yes. *See* S. 16 of the Negotiable Instruments Act.

Chief Justice.—Effect is to destroy Negotiable Instruments Act to a very large extent.

The Advocate-General.—Intention of the Act was to give relief to the poor agriculturists.

T. R. V. Sastri.—Cheques, pronotes, etc., fall under Item 28 of the Federal list and Provincial Legislature cannot deal with them. "Money-lending" Item 27 of Provincial list cannot include "pronotes," if at all the Act is dealing with money-lending.

Chief Justice.—Supposing local legislature said no money-lender shall charge more than 5 per cent. interest and he takes a pronote at 6 per cent. interest?

T. R. V. Sastri.—The legislation will be ineffective to affect pronotes and holder is entitled to get 6 per cent.

Krishnaswami Aiyangar, J.—Even in regulating money-lending local legislature cannot interfere in the Federal list. Money-lender is a person who carries on profession of money-lending.

Wadsworth, J. Refers to the Usurious Loans Act.

T. R. V. Sastri.—Usurious Loans Act does not deal with "money-lending". All kinds of debts and all kinds of lenders will fall under it. *See* S. 3 of the Usurious Loans Act.

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Chief Justice.—Suppose Act IV of 1938 had a clause saving *bona fide* holders of notes for value, will it still affect the Negotiable Instruments Act?

T. R. V. Sastri.—It will.

Chief Justice.—Legislature can cut down interest.

T. R. V. Sastri.—The Federal Legislature can and not the Provincial Legislature.

Krishnaswami Aiyangar, J.—Even Usurious Loans Act has dealt with interest.

T. R. V. Sastri.—It was under the old Government of India Act.

"Money-lending" and "money-lenders" must be construed in a sense known to English Law. *Cf.* S. 6, 63 & 64 Vic., Ch. 51; for definition of "Money-lender" *See* Halsbury (Hailsham Edn.), Vol. 23, p. 121, paragraph 266.

Act IV of 1938 deals with debtor agriculturist and provides for reduction of his debt. This can't be legislation regarding "money-lending" in Item 26 of the Provincial list. "Money-lending" and "Money-lender" is not found in Webster's Dictionary. Macmillan, Oxford, Wharton and Stroud's Dictionaries say that only people who carry on the profession are to be included.

Krishnaswami Aiyangar, J.—You must take it in its literal sense. It is not a term of art.

Wadsworth, J.—No one will think of casual loans as "money-lending".

Chief Justice.—"Money-lending" is business of money-lending.

T.R.V. Sastri.—See *Litchfield* v. *Dreyfus*[1], Farwell, J.

By Item 27 of the Provincial list only regulation of profession of money-lending is thought of.

Compare Canadian Constitution 30 and 31 Vic.. Ch. III, S. 91, Item 18 Dominion list is "Bills of Exchange". Item 13 Province, "Property and civil rights". S. 93. "Education." S. 95 "Agriculture and emigration."

In cases of conflict where a topic fell within both the lists the Dominion legislature had the power to legislate. If there are terms of general and particular import the particular should be taken out of the general. See *Citizens Insurance Company of Canada* v. *Parsons*[2]. Empire Digest, Vol. 17 at 444 (*a*). *See* Lefroy on Canadian Constitution, pp. 488 and 489.

1. (1906) 1 K.B. 584 at 589.
2. (1881) 7 A.C. 96 at 107, 112 and 113.

Chief Justice.—Is this an Act which has relation to pronotes or an Act for relief of agriculturists?

T. R. V. Sastri.—If the Act did not intend to legislate on negotiable instruments which is beyond the powers of the Provincial Legislature I have no complaint. If the power is limited you cannot give the boon you intend to give without touching subjects of Federal Legislation.

Chief Justice.—No further authority is needed. Where there is a particular classification and general classification general cannot include the particular. It is a self-evident proposition.

T. R. V. Sastri.—See *Citizens Insurance Company of Canada* v. *Parsons*[2].

Krishnaswami Aiyangar, J.—You cannot do by implication what you cannot do expressly.

T. R. V. Sastri.—The entire principle is set down in *John Deere Plow Company, Ltd.* v. *Wharton*[3], *Great West Saddlery Company* v. *The King*[4], *Attorney-General for Ontario* v. *Reciprocal Insurers*[5], *Attorney-General for Manitoba* v. *Attorney-General for Canada*[6]. You must look at the substance not the form of the legislation. See also *Attorney-General for Canada* v. *Attorney-General for British Columbia*[7]

Chief Justice.—In the case of simple contract debts with no pronote, can the provincial legislature provide for scaling down?

T. R. V. Sastri.—Yes. It will be in the concurrent list if there is no pronote. I come within the four propositions laid down in *Attorney-General for Canada* v. *Attorney-General for British Columbia*[7]. Only the central legislature can legislate. In *The Regulation and Control of Aeronautics in Canada*, In re[8]. Lord Sankey accepts the four propositions in *Attorney-General for Canada* v. *Attorney-General for British Columbia*[7]. You cannot take away the rights in separate compartments without the co-operation of the two legislatures. *Attorney-General for British Columbia* v. *Attorney-General for Canada*[9] and *Attorney-General for Canada* v. *AttorneyGeneral for Ontario*[10]. The Usurious Loans Act was passed before 1st April, 1937, when Government of India Act of 1938 came into force. Act IV of 1938 is incompetent to affect the Negotiable Instruments Act.

2. (1881) 7 A.C. 96 at 109 (middle).
3. (1915) A.C. 330 at 337, 339, 341 (top).
4. (1921) 2 A.C. 91 at 99, 100 and 116.
5. (1924) A.C. 328 at 337, 339 and 342.
6. (1929) A.C. 260 at 267.
7. (1930) A.C. 111 at 118.
8. (1930) A.C. 111 at 118.
9. (1932) A.C. 54 at 70, 71.
10. (1937) A.C. 377.
11. (1937) A.C. 326 at 353.

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Can the local legislature deal with the debt if it passes into a decree? If you cannot interfere with rights under a pronote, you cannot, confessing your disability indirectly interfere with it after merger into decree. "Civil Procedure" is in concurrent list.

Chief Justice.—Civil Procedure is merely Procedure.

T. R. V. Sastri.—Rights created by a Federal enactment cannot be prevented from being enforced by a Provincial Act

Krishnaswami Aiyangar, J.—No one owing under a pronote would pay without driving the other party to Court. It would mean you put a premium upon non-payment of proper and just debts.

Chief Justice.—If it is interference before decree, then it must be interference after also, since the matter is carried a step further.

Wadsworth, J.—It would mean that the Provincial legislature had the power to veto Federal legislation if it could interfere with cases of promissory notes after decree.

T. R. V. Sastri.—Pronote law as it stood should be given effect to without any reference to provincial legislation. Legislation affecting pronotes could not come under the item "Civil Procedure Code" in the concurrent list.

Chief Justice.—Sub-S. (1) of S. 100 is over-riding section.

T. R. V. Sastri.—*See* S. 292 of Government of India Act.

Chief Justice.—*See* S. 107.

T. R. V. Sastri.—It relates to future legislation.

Advocate-General.—It it is in the concurrent list it is cured by the subsequent assent of the Governor-General.

T. R. V. Sastri.—Item 20 in the provincial list defining "agriculture" is self-evident. Relief granted in regard to debts of agriculturist cannot come under that head.

The liability of junior members of a joint Hindu family is not under the pronote.

Chief Justice.—The Full Bench has held that a junior member is not liable on the pronote.

T. R. V. Sastri.—The liability for necessity, etc., is part of the personal law. See *Balasubrahmanya* v. *Subbayya*[1]. *Krishna Aiyar* v. *Krishnaswami Aiyar*[2] is the earlier Full Bench decision.

1. (1938) 1 M.L.J. 426: L.R. 65 I.A. 93: I.L.R. (1938) Mad. 551 at 567 (P.C.).
2. (1900) I.L.R. 23 Mad. 597 (F.B.).

Krishnaswami Aiyangar, J.—As a liability outside negotiable instruments, it falls in the provincial list.

T. R. V. Sastri.—There is no item in the list regarding liability under personal law.

Advocate-General.—In terms, there is nothing in any list as to Hindu Law obligation.

T. R. V. Sastri.—There are provisions for unprovided items. Liability of a junior member is referred to as liability under personal law. See *Krishna Aiyar* v. *Krishnaswami Aiyar*[1], referred in *Maruthamuthu Naicker* v. *Kadir Badsha Rowther*[2]. The liability is ancillary to liability of senior member and if the liability is treated as on "contract" it must be under the pronote. See *Narayanan Chetty* v. *Virappa Chetty*[3]. A son cannot be sued alone while father is alive, on a debt incurred by the father. Scaling down is provided for in Ss. 7, 8 and 9. S. 14 is the crucial section.

Chief Justice.—The Act differentiates between members.

T. R. V. Sastri.—*See* S. 6.

Chief Justice.—There is nothing in the Act where whole family is agriculturist to scale down for some and not for others. If you cannot scale down for father or manager you cannot scale down for others.

T. R. V. Sastri.—If part of the act is *ultra vires* the residue which is *intra vires* disappears because the scheme of the Act does not allow for differentiation. S. 3 of the Act made the joint family a unit and if the distinction sought to be made in S. 14 was applied to a joint family consisting of agriculturists only it will lead to extraordinary situations.

T. R. V. Sastri.—Then referred to the facts of the cases before the Court.

The Advocate-General (*with him N. Rajagopala Iyengar*) instructed by *The Government Solicitor* for the Madras Government. Prior to the present Government of India Act (1935) India had a unitary constitution. There was no competition in legislative functions. Under the new Act provinces are independent units with sovereign functions and plenary powers with regard to matters in list II and list III of the seventh Schedule to the Government of India Act. Under the new Act "agriculture" is entrusted to provinces, Item 20 in Provincial list

1. (1900) I.L.R. 23 M. 597 (F.B.).
2. (1938) 1 M.L.J. 378: I.L.R. (1938) Mad. 568 at 573 (F.B.).
3. (1916) 31 M.L.J. 386: I.L.R. 40 Mad. 581 at 584.

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—*Agriculture*; "including" is not "exhaustive". Agriculture in all its aspects is entrusted to the Provinces. *See* Items 18 and 19. Agricultural land is confined to Provincial legislature. Provincial legislature is competent to prevent alienation of agricultural land. *Cf.* Punjab Alienation of Lands Act. *See also* provincial item 39 Land Revenue, and Item No. 41 Trade and Commerce and Money-lending and Money-lenders are confided to provinces as Item No. 27 of List II. *See* Parliamentary debates for the surrounding circumstances under which "Money-lending" was included in the Provincial list. The Act should not be interpreted too literally. The Act is an 'organic instrument of the Government' and interpretation should be such as to achieve the object which the legislature had in mind when it passed the Act.

Even in a constitution where there are apparently mutually exclusive lists the duty of Court is to give effect to both and resort to S. 100 must be as a last resort only. See *C. P. & Berar Sales of Motor Spirit Act,* In re1.

Proceeding to the construction of the lists. The rule of construction laid down by the Judicial Committee is (1) If possible to give effect to both lists mutually exclusive and (2) A subject which in one aspect or for one purpose may come under one list may easily come in another list for another purpose.

S. 91 of the British North America Act dealt with the power of the Dominion and the subjects to be exclusively dealt with by the Dominion Parliament and S. 92 dealt with powers of the Provinces and the subjects which Provincial legislature could legislate on. It has frequently been held that if the subject could come under both the lists free play should be given to the autonomous provinces.

In interpreting the expression "Money-lending" assistance can be derived by the course of legislation in this province and other provinces in regard to money-lending. Where a heading was introduced that was not in the nature of a definition but an indication of a "type of a very general and generic description". (*See* Punjab Relief of Indebtedness Act, The Bengal Agricultural Debtors Act, The Bengal Money-lenders Act and the Assam Money-lenders Act.) These Acts were intended to give relief to agricultural debtors and are applicable to all kinds of debts, the main methods being reduction of rent and the application of "Damdupat". Such large scale reforms were in the contemplation of Parliament when it granted provincial legislatures power to give this relief. The dominant idea underlying the Madras Act IV of

1. (1939) 1 M.L.J. (Fed. Supp.), p. 1, 32-33: 2 Fed.L.J. (Nos. 1 & 2), p. 21 and pp. 82 and 83.

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1938 was the protection of agriculture the staple industry of the Province. The sphere of the legislative jurisdiction was 'agriculture' and the means to rehabilitate agricultural industry was through regulation of money-lending. If you are to decide that this Act is *ultra vires* you will have to decide positively that this enactment did not relate to "agriculture" and "money-lending" and was in truth a legislation relating to pronotes and bills of exchange. (See *Gallagher* v. *Lynn*[1].) It is the purpose of the legislation that should be taken into consideration in construing an enactment. If legislation trenched upon some thing which was within the competence of another legislature the fact that it so trenched on some other legislation should not be taken into consideration.

In *Gallagher* v. *Lynn*[1], the House of Lords held that a legislation to regulate the supply of milk though it cut into "trade" and commerce was *intra vires*—they held that in pith and substance the legislation was for the peace, order and good government of Northern Ireland and though it affected or trenched upon trade relating to the prohibited area it was valid. The legislation was not with regard to trade though it might affect trade.

Chief Justice.—If the principal character of the legislation is within the power of the provincial Government, the fact that it might affect the federal enactment does not invalidate the legislation—is that your point?

Advocate-General.—That is my submission to your Lordships.

Though *Gallagher* v. *Lynn*[1] did not deal with a federal constitution *Shannon* v. *Lower Mainland Dairy Products Board*; *Attorney-General for British Columbia* (*Intervening*)[2] deals with a federal constitution and follows a long string of cases.

Chief Justice.—You say that the present legislation is to give relief to agriculturists and their indebtedness and not to amend Negotiable Instruments.

Advocate-General.—Yes.

Chief Justice.—I understand you to say that if a Federal Law had been passed this Act might be invalid.

Advocate-General.—Yes. From 1st April, 1937, it is as if Federal parliament had come into existence for distribution of legislative powers. Before that date we had Indian Acts. I shall deal with this point later. I shall refer to another class of cases. The plan of the Government of India Act resembles the Canadian rather than the Australian. In the Canadian Act there is a specific provision

1. (1937) A.C. 863 at 869. 2. (1938) A.C. 708.

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—S. 91 making the lists exclusive and giving dominance to Federal legislature. In spite of it the Privy Council has construed it in a way to give full effect to both lists and not to curtail the dominion' powers. A particular subject looked at from one aspect and treated for one purpose might fall under the Federal list and viewed at from another aspect and enacted for another purpose might come under the Provincial list. This theory of "aspect and purpose" has been considered by the Judicial Committee in the following cases, where the theory of "exclusiveness" under Ss. 91 and 92 of British North America Act are got over. *Hodge* v. *The Queen*[1], *Russell* v. *The Queen*[2] and *John Deere Plow, Co., Ltd.* v. *Wharton*[3]; (1934) Canadian Rep. at p. 661 (Supreme Court.)

Chief Justice.—An Act within the powers of a provincial legislature to the extent it nullifies a Federal Law will be bad?

Advocate General.—Yes.

If there was a clash Dominion legislation is to prevail, this is put in as an express provision in our constitution.

S. 107, Government of India Act, 1935, dealing with existing Indian Law is new and has no counter-part in Canadian constitution (the British North America Act). The expressions 'Federal law' and "Indian law' are used in the Act. Indian law is defined by S. 311 as law passed before the commencement of the Act. Negotiable Instruments Act is an existing Indian Law. So also Civil Procedure Code. If it is an existing Indian Law in the concurrent field it is provided for and can be cured under S. 107 (2). Indian law in Federal list is unprovided for. There is no Federal law as to Negotiable Instruments Act repugnant to the present provincial law, and the Debt Relief Act is a legislation within the field of Provincial legislation and it did not nullify any Federal law. If it is in the concurrent list assent of Governor-General has cured it. I say I come under "Money-lending" exclusively. At the highest the only law with which the present Act clashes is "Indian law" and there is no Federal law yet on the subject. The lists read with S. 100 makes this legislation competent. The existence of a prior Indian Act does not affect the rights of the province. The provincial legislature has exercised a power which it is vested with under the exclusive list. If there is intrusion into concurrent list, ("contracts" "procedure" "Transfer of Preperty Act") it is cured. Mere repugnancy to powers of Federal legislature cannot

1. (1883) 9 A.C. 117 at 128.
2. (1882) 7 A.C. 829.
3. (1915) A.C. 330 at 331 and 338.

invalidae the provincial legislature. Until and unless the Federal legislature passed an Act the Provincial Act is valid. S. 107 does not apply to the present case, because there is no Federal law in existence. Under S.316, Indian legislature is to function till Federal legislature comes into existence. The possibility of an overlap is not sufficient. In each case neither legislation will be invalid until and unless the field is occupied. See *Attorney-General for Canada* v. *Attorney-General for British Columbia*[1]. (Lord Tomlin's 4th proposition). Provincial legislature can override Indian law though it cannot override Federal law. The two lists have to be read so as to give effect to both.

Chief Justice.—You say the Debt Relief Act will be bad if Negotiable Instruments Act were a Federal Act.

Advocate-General.—It will be bad not by reason of S. 100 but by S. 107. *Attorney-General of Ontario* v. *Attorney-General for the Dominion of Canada*[2], is authority for the proposition that some provisions of a provincial enactment might appropriately find a place in a legislation by the Federal legislature within its exclusive sphere. A provincial law to the extent of repugnancy is void. Though a subject from one aspect may be a Federal subject from another it may be a provincial subject and it will be valid to the extent it is not repugnant to federal legislation. If it is not repugnant to a Federal law it will be valid, if it is obviously within its sphere. Repugnancy to "Indian law" is not repugnancy to "Federal law". See 36 Commonwealth L.R. Australia 130 at 155. How far can legislature interfere with decrees passed on pronotes. *See* Item 4 in concurrent list. Provincial legislature can regulate substantive rights by altering provisions of Civil Procedure Code as to executability and as regards the amounts realisable thereunder. *S. 7 of Act IV of 1938* provides that decrees are executable only to the extent scaled down against properties, etc.

Krishnaswami Aiyangar, J.—I read the section as reducing the debt itself.

Chief Justice.—Local legislature can under certain circumstances legislate for "contracts". This Act relates to contracts.

Krishnaswami Aiyangar, J.—It is a reduction of the debt itself and not mere procedure. See S. 7, sub-S. (2).

Advocate-General.—It is open to provincial legislature to say which property can be proceeded against. In any event beyond the

1. (1930) A.C. 111. 2. (1894) A.C. 189.

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amount scaled down you cannot proceed against any property in the province. In regard to "land" it is a provincial subject—Item 21. It is competent for the provincial legislature to enact that land will be inalienable.

If family members' liability is not on pronotes but on the debt it will come under "contracts". Regarding the contention that this is an unprovided item. See *C. P. & Berar Sales of Motor Spirit Act,* In re[1] and S. 104, Government of India Act. Governor-General may by notification empower either legislature to legislate for any item not provided. "Contracts" will include every result following from it.

Chief Justice.—Does this Act infringe on Negotiable Instruments Act' is the narrow issue in the case.

[*K. Krishnaswami Aiyangar* for the Judgment-debtor in C. S No. 367 of 1928 High Court stated the facts of his case.

Application No. 1270 of 1938 in C. S. No. 367 of 1923 referred by Gentle, J. and heard with these references was remanded to the lower Court as there was no finding whether the applicant was an agriculturist].

Advocate-General continuing.—The point for consideration is the liability of a son or a junior member under Hindu Law. It is only on the debt and not on the promissory note that the liability of the junior members can arise. The Hindu Law obligation is fastened on a junior member in respect of a debt con- tracted by the father or the manager. The contention for other side is that this is a case which is not provided for either in the Federal, Provincial or Concurrent List and that the Governor-General must authorise one or other legislature to deal with this matter. Under the scheme of the Indian Constitution the effort of Parliament has been to make as exhaustive a list as possible and leave no scope for any residue or the exercise of residuary power.

Chief Justice.—I appreciate that argument. Under what heading would you bring it? It is not the intention of Parliament to leave it vague.

Advocate-General.—Under 'contract,' item 10 in the concurrent Legislative List. When the word 'contract' is used it does not mean Contract Act but it means everything relating to the subject of contract. When in a constitutional enactment a general heading is given the proper method of interpretation is to treat the subject as including it in all its aspects and for all purposes. Otherwise you will have to put in a definition clause for each one of these things. All legal consequences flowing from the contract would be included

1. (1939) 1 M.L.J. (Fed. Supp.), p. 29: 2 Fed.L.J. (Nos. 1 & 2), p. 16.

under the heading 'contract'. It is used in the most comprehensive sense of "contract" whether with reference to the personal law of the parties or with reference to the normal ideas of contract law. Your Lordships will have regard to the fact that the way in which you approach the interpretation of a constitutional enactment giving power to the legislature is different from the way in which you will interpret an enactment dealing with a particular subject. The Constitution Act gives power to make laws in regard to contracts and in regard to agency. The legislative power exists so that changes may be effected in the existing law of the land. It does not exist in order to stereotype the law of the land. *See Attorney General for British Columbia* v. *Attorney-General for Canada*[1], My submission is that it is a genuine piece of "contract" legislation. *See* as to nature of liability under Hindu Law. Mayne's Hindu Law pp. 380, 381. *Chinnaya Nayudu* v. *Gurunatham Chetti*[2].

Chief Justice.—Is this Act in pith and substance within item 10?

Advocate-General.—I say it is a law relating to money-lending. If that is conceded there is no need to go into this.

Chief Justice.—You say that this is matter which arises out of "contract" and therefore it is covered by the general heading 'contract'. If the Court decides on the main point this point does not arise?

Advocate-General.—Yes. The general heading will have to be understood in a comprehensive sense and not a narrow sense. Understood in that sense, all legal consequences flowing from a contract can properly be the subject of legislation by the provincial legislature in the concurrent list.

[*Advocate-General.*—I was given notice only in the original side application. There are three referred cases. I have argued on the questions arising out of them. I request Your Lordships to give me notice in respect of these cases.

Chief Justice.—Treat this as notice given.]

Advocate-General.—There are two parts to S. 107. One is a provision for "Federal law" which the Federal Legislature is competent to enact with reference both to Federal List and Concurrent List. If any provincial legislation is repugnant to the Federal law to that extent it will be void. So far as "existing Indian law" is concerned, Indian law in the Federal list is not provided for. Provision is made in S. 107 with respect to an Indian law in the concurrent legislative list. If the Provincial law is repugnant to

1. (1937) A.C. 391. 2. (1882) I.L.R. 5 Mad. 169 (F.B.).

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an Indian law in the concurrent field it will be cured by reservation. As to Indian law in the provincial list there is no necessity to provide for it as the Provincial legislature has complete power to repeal its own laws. My main point is there is no "Federal law" in regard to negotiable instruments. The only law as to it is an "Indian law." Whether and how far the Indian law can be affected by any provincial legislation in invasion of "promissory notes and bills of exchange in respect of money-lending" is a matter outside S. 107 which has to be dealt with with reference to the provisions of S. 100 read with the schedules. It is only if in some aspect and for some purpose the provincial legislature has the power that it can legislate and that is my main argument. I do not mean to suggest that every federal power can be invaded by the provincial power if the federal legislature does not act. That point has to be made clear. I am not attempting to legislate on a federal field. The mere fact that there is an Indian Law on a federal subject is immaterial.

T. R. V. Sastri in reply.—The Debt Relief Act affects directly Negotiable Instruments. You cannot legislate so as to affect debts under Negotiable Instruments whether or not there was other legislation, Indian or Federal. The Debt Relief Act should be assumed to deal with only matters over which it had jurisdiction. If by implication it dealt with Negotiable Instruments, that portion is directly against the Constitutional Act and must be void. If you have a general topic in one list and a particular topic in another read the general excluding the particular. See *Citizens Insurance Co. of Canada* v. *Parsons*[1]. India Act, 1935, having the experience of conflicts in Canadian and Australian Acts, made the topics not run into each other's sphere. Negotiable Instruments Act will stand till it is dealt with by competent legislature. *Vide* S. 292 of India Act. The Federal Legislature alone can deal with it.

Chief Justice.—Will Legislature have power to say, only scaled down debt can be recovered by money-lender?

T. R. V. Sastri.—Yes.

Chief Justice.—If there is a pronote?

T. R. V. Sastri.—It can be sued on in full.

In item 27.—"Money-lending and Money-lender"—you fasten your attention on the money-lender. The present Act is not one relating to money-lending or money-lender, but to give relief to agriculturists. By money-lending and money-lender only special class is contemplated not all debtors and creditors. "Agriculture" is the totality of agricultural operations. In the present Act any

1. (1881) 7 A.C. 96 at 108.

consequences to agriculture will be an accident. If "any debt" in the Act is implied to include pronote debts, then it would be invalid.

If there is provision for one legislature in one sphere and another in another sphere without referring to the first both must be given effect to without infringing on each other. See *The Board of Commerce Act,* 1919, *and The Combines and Fair Prices Act,* 1919. *In re*[1]. A provincial matter may be legislated for by the Dominion legislature when the matter is one of dominion importance.

Chief Justice.—Do you say under no circumstances the provincial legislature can interfere with pronotes?

T. R. V. Sastri.—Yes.

Chief Justice.—Has the "aspect and purpose" proposition been doubted in any later case?

T. R. V. Sastri.—The theory of aspect, was a mode of dividing the spheres between the Central and Provincial Legislatures and not for working them in the same sphere. If "pronotes" is a central subject under no possible head can Provincial Legislature deal with it. In cases of overlapping Provinces should give way to the Central Legislature, "pronotes" being a central subject, "money-lending" minus "pronotes" is the only sphere in which provinces could legislate.

Chief Justice.—You cannot dissociate "money-lending" from "pronotes" in this country.

T. R. V. Sastri.—What cannot be done directly cannot be done indirectly. Liability under "pronote" being one and indivisible it cannot be separated as agriculturists' pronotes and so on. All existing enactments continue in force unless repealed by a "competent authority". In *Citizens Insurance Co. of Canada* v. *Parsons*[2], competent authority is construed to mean such authority as would have power to re-enact that legislation. See also *Sadanand Jha* v. *Aman Khan*[3]

Chief Justice.—If legislation on money-lending was in the exclusive power of the Province what would be the virtue of that power to the Province if it had not the power to deal with pronotes for all practical purposes?

Krishnaswami Aiyangar, J.—If pronotes are taken away will it not render the Act absolutely nugatory?

T. R. V. Sastri.—It might be. But till Negotiable Instruments Act is altered or repealed the law will continue to operate. "Pronotes" in Federal list was not intended to be divided. Under

1. (1922) 1 A.C. 191 at 198.
2 (1881) 7 A.C. 96.
3 (1938) 20 P.L.T. 1 (F.B).

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Hindu Law, liability of junior member arose out of their personal law and not on contract by manager and it would not fall under "contract" in the concurrent list.

Advocate-General.—Sadanand Jha v. *Aman Khan*[4], dealt with a subject in concurrent list and has no application here. The observation that Provincial Legislature cannot trench on sphere of Federal Legislature even where it was a necessary incident to the legislation within the competence of the Provincial Legislature is not a correct statement of the law and is against the Privy Council decisions.

7th Feb. 1939. The judgment of the Court was delivered by

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The Chief Justice:—Under the provisions of O. 46, r. 1 of the Code of Civil Procedure the District Munsif of Guntur, the District Munsif of Cuddalore and the Subordinate Judge of Cocanada have referred to this Court for decision questions with regard to the validity of the Madras Agriculturists' Relief Act, 1938, an Act passed by the Madras Legislature to provide for the relief of indebted agriculturists in the Province. The Act provides for the scaling down of debts and interest and for remission of arrears of rent. All the references raise the question whether the provisions of the Act relating to the scaling down of debts and interest are *ultra vires* the powers of the Provincial Legislature in that these provisions are repugnant to provisions of the Negotiable Instruments Act, 1881. The reference by the District Munsif of Guntur couples the Usurious Loans Act, 1918, with the Negotiable Instruments Act and the reference by the District Munsif of Cuddalore raises the further question whether the Act is *ultra vires* because its provisions conflict with the provisions of Hindu Law which impose upon a son the pious obligation to discharge his father's debts, lawfully contracted, and liability on a member of a joint family to pay out of his share of the family property a debt incurred by the manager of the family for a family necessity. The references have been heard together and it will be convenient to answer them in one judgment.

The objections to the Madras Agriculturists' Relief Act are based on provisions of the Government of India Act, 1935, and the questions referred will be more readily understood if the relevant sections of the latter enactment are first stated. S. 99 of the Government of India Act provides that subject to the provisions of the Act, the Federal Legislature may make laws for the whole or any part of British India or

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for any Federal State, and a Provincial Legislature may make laws for the Province or for any part thereof. S. 100, sub-S. (1) confers upon the Federal Legislature exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule to the Act (the "Federal Legislative List"). Sub-S. (2) provides that, notwithstanding anything in sub-S. (3), the Federal Legislature, and subject to sub-S. (1) a Provincial Legislature also, have power to make laws with respect to any of the matters enumerated in List III in the Schedule, (the "Concurrent Legislative List"). Sub-S. (3) states that subject to the two preceding sub-sections the Provincial Legislature has, and the Federal Legislature has not, power to make laws for a Province or any part thereof with respect to any of the matters enumerated in List II (the "Provincial Legislative List"). The Provincial Legislature is, therefore, given exclusive power to legislate with regard to the matters specified in List II. S. 107 deals with the position when there is inconsistency between a Federal law and a Provincial law, or between an "existing Indian law" and a Provincial law. Sub-S. (1) of this section reads as follows:—

"If any provision of a Provincial law is repugnant to any provision of a Federal law which the Federal Legislature is competent to enact or to any provision of an existing Indian law with respect to one of the matters enumerated in the Concurrent Legislative List, then subject to the provisions of this section, the Federal law, whether passed before or after the Provincial law, or, as the case may be, the existing Indian law shall prevail and the Provincial shall to the extent of the repugnancy be void".

An existing Indian law is defined in S. 311. It is not necessary to set out the whole of the definition. Stated shortly, it means any law which was lawfully passed before the commencement of Part III of the Act. Part III relates to Governors' Provinces and deals *inter alia* with the constitution of Provincial Legislatures. It came into force on the 1st April, 1937.

Sub-S. (2) of S. 107 states:

"Where a Provincial law with respect to one of the matters enumerated in the Concurrent Legislative List contains any provision repugnant to the provisions of an earlier Federal law or an existing Indian law with respect to that matter, then, if the Provincial law, having been reserved for the consideration of the Governor-General or for the signification of His Majesty's pleasure has received the assent of the Governor-General or of His Majesty, the Provincial law shall in that Province prevail, but nevertheless the Federal Legislature may at any time enact further legislation with respect to the same matter".

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Reading sub-Ss. (1) and (2) of S. 107 together the effect is this. A Federal law always overrides a Provincial law unless the Provincial law is in respect of one of the matters enumerated in the Concurrent Legislative List and has been reserved for the consideration of the Governor-General or for the signification of His Majesty's pleasure and has received the assent of the Governor-General or of His Majesty, in which case the Provincial law prevails in the Province until the Federal Legislature chooses to legislate further. The position is the same in respect of an "existing Indian law". An existing Indian law with respect to a matter enumerated in the Concurrent Legislative list overrides a Provincial law unless the Provincial-law has been reserved and has received the assent under sub-S. (2). The power of the Federal Legislature to legislate further when a Provincial law has been reserved and has received the assent is subject to the proviso that no Bill or amendment shall be introduced without the previous sanction of the Governor-General. The respective legislative lists are comprehensive, but S. 104 empowers the Governor-General to assign to the Federal Legislature or to a Provincial Legislature a matter which has not been enumerated.

To the Federal Legislature is given the power of legislating with regard to:

"Cheques, bills of exchange, promissory notes and other like instruments".

This is paragraph 28 of the Federal Legislative List. To the Provincial Legislature is given the power of legislating with regard to "agriculture" (paragraph. 20). The word "agriculture" is used in a wide sense and it is expressly stated that it includes agricultural education and research, protection against pests and prevention of plant diseases, improvement of stock and prevention of animal diseases, veterinary training and practice, pounds and the prevention of cattle trespass. The Provincial Legislature's powers also relate to "land", that is to say, rights in or over land, land tenures including the relation of landlord and tenant and the collection of rents; transfer, alienation and devolution of agricultural land, land improvement and agricultural loans (paragraph 21) and "money-lending and money-lender" (paragraph 27). Included in the Concurrent Legislative List are:

"Contracts including partnership, agency, contracts of carriage and other special forms of contract, but not including contracts relating to agricultural land" (para. 10).

I will now turn to the provisions of the Madras Agriculturists' Relief Act. S. 7 of the Act provides that notwithstanding any law, custom, contract or decree of Court to the contrary, all debts payable by an agriculturist at the commencement of the Act, shall be scaled down in accordance with the provisions of Chapter II of the Act. No sum in excess of the amount as so scaled down shall be recoverable from him or from any land or interest in land belonging to him; but shall his property be liable to be attached and sold or proceeded against in the execution of any decree against him in so far as such decree is for an amount in excess of the sum as scaled down under Chapter II. S. 8 makes provision for the scaling down of debts incurred before the 1st October, 1932. The section states that all interest outstanding on the 1st October, 1937, in favour of any creditor of an agriculturist whether the same be payable under law, custom or contract or under a decree of Court and whether the debt or other obligation has ripened into a decree or not, shall be deemed to be discharged and only the principal or such portion thereof as may be outstanding shall be deemed to be the amount repayable by the agriculturist on that date. Where an agriculturist has paid to any creditor twice the amount of the principal whether by way of principal or interest or both, such debt including the principal, shall be deemed to be wholly discharged. Where the sums repaid by way of principal or interest or both fall short of twice the amount of the principal, such amount only as would make up this shortage, or the principal amount or such portion of the principal amount as is outstanding, whichever is smaller, shall be repayable. Where a debt has been renewed or included in a fresh document in favour of the same creditor, the principal originally advanced by the creditor together with such sums if any as have been subsequently advanced as principal shall alone be treated as the principal sum repayable by the agriculturist under the section. S. 9 makes provision for scaling down of debts incurred on or after the first October, 1932. In such cases interest shall be calculated up to the commencement of the Act at the rate applicable to the debt under the law, custom, contract or decree of Court under which it arises or at 5 per

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cent. per annum simple interest, whichever is less, and credit shall be given for all sums paid towards interest and only such amount as is found outstanding for interest thus calculated shall be deemed payable together with the principal amount or such portion of it as is due. Any part of the debt which is found to be renewal of a prior debt shall be deemed to be a debt contracted on the date on which such prior debt was incurred, and if such debt had been contracted prior to the 1st October 1932 shall be dealt with under the provisions of S. 8. S. 12 states that all debts which have been scaled down under the provisions of the Act shall, so far as any sum remains payable thereunder, carry from the date up to which they have been scaled down interest on the principal amount due on that date at the rate previously applicable under law, custom, contract or otherwise; provided that it shall not in any case exceed 6¼ per cent. per annum simple interest. Under S. 13, in any proceeding for recovery of a debt, the Court shall scale down all interest on any debt incurred by an agriculturist after the commencement of the Act, so as not to exceed a sum calculated at 6¼ per cent. per annum simple interest, but power is reserved for the Provincial Government to alter and fix any other rate of interest from time to time.

The Madras Agriculturists' Relief Act makes no difference between a simple contract debt and debt due on a promissory note or other negotiable instrument. Therefore, debts arising on negotiable instruments are within the purview of the Act. If debts on promissory notes were excluded, the Act would to a very large extent be rendered nugatory, the practice of lending money on promissory notes being so widespread. It is said that as the Negotiable Instruments Act contemplates the payment of the full amount due on a negotiable instrument, the Provincial Legislature has no power to enact a measure which cuts down the amount payable on the negotiable instrument. In this connection, our attention has been drawn to the provisions of Ss. 32, 78, 79 and 80 of the Negotiable Instruments Act. S. 32 states that in the absence of a contract to the contrary, the maker of a promissory note and the acceptor before maturity of a bill of exchange are bound to pay the amount thereof at maturity according to the apparent term of the note or acceptance respectively, and the acceptor of the bill of exchange at or after maturity is bound to pay the amount thereof to the holder on

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demand. S. 78 says that subject to the provisions of S. 82, which relates to the discharge from liability, payment of the amount due on a promissory note, bill of exchange or cheque, must in order to discharge the maker or acceptor, be made to the holder of the instrument. S. 79 requires that when interest at a specified rate is expressly made payable on a promissory note or bill of exchange interest shall be calculated at the rate specified on the amount of the principal money due thereon, from the date of the instrument, until tender or realisation of such amount, or until such date after the institution of a suit to recover such amount as the Court directs, and S. 80 states that interest shall be calculated at 6 per cent. per annum where no interest is specified in the instrument.

The first question which falls for decision is whether the Madras Agriculturists' Relief Act is a measure which is directly within the exclusive powers conferred upon the Provincial Legislature. The Government of India Act, 1935, has been drafted in the light of the experience gained by the working of the Canadian and Australian Constitutions, particularly by the working of the Canadian Constitution which is governed by the British North America Act, 1867. The British North America Act differs in an important respect from the Government of India Act in that it contains no Concurrent Legislative List, apart from the two subjects mentioned in S. 95. The powers of the Federal Parliament in Canada are defined in S. 91 of the Act and the powers of the Provincial Legislatures in S. 92. But the fact that there is a Concurrent Legislative List in the Indian Act does not affect the principles which apply in deciding what is within the exclusive power of the Federal Legislature and what is within the exclusive power of a Provincial Legislature. There have been numerous cases before the Privy Council relating to the British North America Act and the principles stated by the Judicial Committee in those cases have direct application when the Court has to consider whether a particular Act is or is not *ultra vires* the powers of a Provincial Legislature. However carefully an Act is drawn it is not possible to avoid questions arising with regard to the powers of the respective legislatures, but as was stated in *Citizens Insurance Company of Canada* v, *Parsons*[1] it could not

1. (1881) 7 A. C. 96.

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have been the intention that conflict should exist and in order to prevent such a result, the two sections must be read together, and the language of one interpreted, and, where necessary, modified, by that of the other. In this way, as was further pointed out, it may be, in most cases, be found possible to arrive at a reasonable and practical construction of the language of the sections so as to reconcile the respective powers they contain, and give effect to all of them. The fact that an Act of a Provincial Legislature may in some respect trench upon a Federal subject is not the deciding factor. In deciding whether a particular Act is *ultra vires* the powers of a Legislature the Court has to have regard to "the true nature and character of the legislation in the particular instance in order to ascertain the class of subjects to which it really belongs". *Russell* v. *The Queen*[2]. In *Hodge* v. *The Queen*[3] the Privy Council, in deciding whether an Act passed by the Legislature of the Province of Ontario and known as "The Liquor Licence Act of 1877" was within the powers of the Provincial Legislature said that subjects which in one aspect and for one purpose fall within S. 92 of the British North America Act may in another aspect and for another purpose fall within S. 91. In other words, in one aspect and for one purpose a subject may be within the powers of the Federal Parliament while in another aspect and another purpose it may fall within the powers of a Provincial Legislature. This statement of the law was emphasised in *John Deere Plow Company, Ltd.* v. *Wharton*[4] where Lord Haldane, in delivering the Judgment of the Board observed:—

"It must be borne in mind in construing the two sections, that matters which in a special aspect and for a particular purpose may fall within one of them may in a different aspect and for a different purpose fall within the other. In such cases the nature and scope of the legislative attempt of the Dominion or the Province, as the case may be, have to be examined with reference to the actual facts if it is to be possible to determine under which set of powers it falls in substance and reality."

The House of Lords expressed the same opinion in *Gallagher* v. *Lynn*[1] a case under the Government of Ireland Act, 1920. That Act conferred upon the Parliament of Northern Ireland the power to make laws for the peace, order and good

2. (1882) 7 A.C. 829.
3. (1883) 9 A. C. 117.
4. (1915) A. C. 330 at 339.
1. (1937) A. C. 863.

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Government of Northern Ireland with certain limitations. The Act expressly provided that the Parliament of Northern Ireland should not have power to make laws in respect of

"trade with any place out of that part of Ireland within their jurisdiction, except so far as trade may be affected by the exercise of the powers of taxation given to the said Parliaments, or by regulations made for the sole purpose of preventing contagious disease, or by steps taken by means of inquiries or agencies out of that part of Ireland within their jurisdiction for the improvement of the trade of that part or for the protection of traders of that part from fraud".

The Parliament of Northern Ireland passed an Act called the Milk and Milk Products Act (Northern Ireland), 1934, which had the effect of putting an end to the milk trade between the farmers of Donegal which is in the Free State and customers in Derry which is in Nothern Ireland. It was said that the Act was an Act in respect of trade outside Northern Ireland. The House of Lords refused to accept this contention holding that it was a law for the peace, order and good Government of Northern Ireland in respect of precautions taken to secure the health of the inhabitants of Northern Ireland by protecting them from the dangers of an unregulated supply of milk. Lord Atkin observed:—

"It is well-established that you are to look at the 'true nature and character of the legislation" *Russell* v. *The Queen*[2], 'the pith and substance of the legislation'. If, on the view of the statute as a whole, you find that the substance of the legislation is within the express powers, then it is not invalidated if incidentally it affects matters which are outside the authorised field. The legislation must not under the guise of dealing with one matter in fact encroach upon the forbidden field. Nor are you to look only at the object of the legislator. An Act may have a perfectly lawful object *e.g.* to promote the health of the inhabitants, but may seek to achieve that object be invalid methods, *e.g.* a direct prohibition of any trade with a foreign country. In other words you may certainly consider the clause of an Act to see whether they are passed 'in respect of' the forbidden subject. In the present case any suggestion of an indirect attack upon trade is disclaimed by the appellant. There could be no foundation for it. The true nature and character of the Act, its pith and substance, is that it is an Act to protect the health of the inhabitants of Northern Ireland; and in those circumstances, though it may incidentally affect trade with County Donegal, it is not passed 'in respect of' trade, and is therefore not subject to attack on that ground".

The passage which I have quoted from the judgment of Lord Atkin (which was concurred in by Lord Thankerton, Lord Macmillan and Lord Wright) was quoted *in extenso* in the

2. (1883) 7 A.C. 829.

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judgment of the Privy Council in *Shannon* v. *Lower Mainland Dairy Products Board*[1] a case which related to the powers of the British Columbia Legislature to set up a central marketing Board, to establish or approve schemes for the control and regulation within the province of the transportation, packing, storage and marketing of natural products, to constitute marketing Boards, to administer such schemes and to vest in them powers considered necessary or advisable to exercise those functions, including the powers to fix and collect licence fees. It was held that the Act did not encroach upon the powers of the Federal Legislature to deal with the regulation of trade and commerce and the raising of money by taxation. The Court has, therefore, to look to the Madras Agriculturists' Relief Act to see whether it is in substance within the express powers of the Provincial Legislature. If it is, it is not invalidated because incidentally it may affect matters which are within the Federal field.

The Madras Agriculturists' Relief Act, 1938, was placed on the Statute book because the Madras Legislature considered that it was expedient to provide relief to indebted agriculturists in the Province and the provisions of the Act are all directed to the attainment of this object. The Court is not concerned with the policy of the Act, but with the effect of its provisions. That agriculturists in the Province are heavily indebted is a matter of common knowledge and the Legislature decided that the situation demanded that relief should be given to them in the form of the scaling down of their debts. Agriculturists who are overburdened with debt cannot cultivate their lands to the best advantage. They have not the means, and there is a risk of their lands passing into the hands of non-agriculturists to the determent of agriculture. Therefore the Act is one which does relate to agriculture and consequently relates to a subject reserved for the provincial Legislature. But the matter does not rest there. The Act is certainly one which relates to money-lending to agriculturists and money-lending is another subject which is reserved for the Provincial Legislature. The power to deal with money-lending must carry with it a power to limit the amount to be recovered by the money-lender. This has not been seriously challenged. The main attack on the Act has been based on the fact that its scaling down provisions are repugnant

1. (1938) A. C. 708.

to the Negotiable Instruments Act in that they do not allow the full amount due on a promissory note to be recovered from an agriculturist. But we do not regard the Agriculturists Relief Act as really affecting the principles embodied in the Negotiable Instruments Act. Negotiation of a promissory note is not prohibited nor is it said that a maker or an indorser shall not be liable.. The only effect of the Madras Agriculturists' Relief Act so far as Negotiable Instruments are concerned is to reduce liability where the maker or indorser is an agriculturist. In providing for this the Provincial Legislature was acting in the interests of agriculture and regulating money-lending to agriculturists. It could never have been the intention of Parliament in conferring a general power on the Federal Legislature to legislate with regard to negotiable instruments to reduce the power of Provincial Legislature to deal with subjects within its exclusive control. When examined the Madras Agriculturists' Relief Act is in substance within the express powers of the Madras Legislature and the fact that in particular cases it may operate to reduce liability on contracts evidenced by negotiable instruments cannot affect its validity. The authorities which I have quoted are definite on the point.

Even if the matters dealt with in the Madras Agriculturists' Relief Act do not come within the exclusive powers of the Provincial Legislature the Act can be supported on the ground that it relates to contracts falling within the Concurrent Legislative List. The indebtedness of the agriculturists arises out of contract and contract of the nature contemplated by the Concurrent Legislative List. Regarding the Act as an Act dealing with a matter falling within the Concurrent Legislative List, S. 107 of the Government of India Act comes into operation. The Negotiable Instruments Act is an "existing Indian Law" within the meaning of S. 107. The Madras Agriculturists' Relief Act was reserved for the consideration of the Governor-General under the provisions of S. 107 (2) and received his assent. Therefore even if the Act does not come within the exclusive powers of the Legislature its provisions must prevail in the Province by virtue of the provisions of S. 107 of the Government of India Act, unless and until the Federal Legislature thinks fit to legislate in respect of the same matter. But by virtue of the proviso to the section this cannot happen without the previous sanction of the Governor-General.

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The argument based on the Usurious Loans Act stands or falls with the argument based on the Negotiable Instruments Act. If the Provincial Legislature had the power to pass the Madras Agriculturists' Relief Act as being an Act dealing with matters in the Provincial Legislative List—and we hold that it had—the fact that it affects, so far as agriculturists are concerned, the discretion given to the Court by the Usurious Loans Act can make no difference to its validity. But in any event the Madras Agriculturists' Relief Act here again finds support from the provisions of S. 107 of the Government of India Act. In the course of the argument our attention was drawn to the decision of the Patna High Court in *Sadanand* v. *Aman Khan*[1]. We have been given to understand that this decision is being made the subject-matter of an appeal to the Federal Court, and in these circumstances we do not consider it fitting that we should discuss the views expressed in the judgments delivered by the learned Judges who decided that case. It is sufficient to say that in deciding the references now before us we have considered the Patna decision.

The only question which remains to be considered is whether the Madras Agriculturists' Relief Act is *ultra vires* because it conflicts with the provisions of the Hindu law imposing on a son pious obligation to discharge his father's debts and liability on a member of a joint family to pay out of his share of the family property debts incurred by the manager of the family for family necessity. The argument here is that the Government of India Act does not authorise either the Federal Legislature or the Provincial Legislature to legislate on matters relating to Hindu Law and that, therefore, until the Governor-General under the powers conferred upon him under S. 104 of the Act has assigned to the Federal Legislature or the Provincial Legislature power to enact laws with regard to Hindu law, neither Legislature can pass an Act which alters the personal law of the Hindus. The Provincial Legislature has power to legislate with regard to contracts and no exception is made in respect of contracts entered into by Hindus. There is no Federal or "existing Indian law" which stands in the way and even if there were the sanction of the Governor-General given under S. 107 (2) of the Government of India Act would

1. (1938) 20 P L.T. 1.

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remove it. The Provincial Legislature had, therefore, full power to legislate with regard to contracts entered into by Hindus and to reduce their contractual obligations. A Hindu son cannot be made liable for more than what his father is liable for, and in cutting down the father's liability, the Legislature is not interfering with any principle of Hindu Law. The same remarks apply in the case of the manager of a family contracting a debt for family necessity. The members of the family are liable to the extent of their interests in the family property for so much of the debt as is lawfully recoverable. The manager is in the position of an agent and the Provincial Legislature has under the Concurrent Legislative List power to legislate with regard to agency as well as with regard to contract. There is no substance in the argument that the Act operates to change the principles of Hindu Law.

For the reasons indicated we hold that the Madras Agriculturists' Relief Act is *intra vires* the powers of the Provincial Legislature and the references will be answered in the sense indicated in this judgment. The costs of the reference will in each case be made costs in the cause. We grant a certificate in each case under S. 205 of the Government of India Act, 1935. (Memorandum of costs will follow).

K. S. *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING AND MR. JUSTICE STODART.

Vadrevu Sankaramurthi and another .. *Appellants* (Defendants 3 and 4)*

v.

Vadrevu Subbamma .. *Respondent (Plaintiff).*

Sankaramurthi *v.* Subbamma.

Hindu Law—Maintenance—Widowed daughter-in-law—Right in respect of self-acquired property of father-in-law—Enforceability against donee or devisee of property.

A widowed daughter-in-law has no legal right under the Hindu Law to claim maintenance from her father-in-law out of his self-acquired property but only a moral right; and if on her father-in-law's death that property descends by inheritance to his heirs her moral right becomes a legal right at the moment of his death as against them and as against the property which they have so inherited. But she does not acquire such a legal right against

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* S A. No. 1227 of 1932. 8th August, 1938.

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the devisee or donee of the self-acquired property where it descends not by inheritance but by a deed of will or gift executed by the father-in-law.

Observations of Subramania Aiyar, J. in *Rangammal* v. *Echammal*; (1898) 9 M.L J. 14: I.L.R. 22 Mad. 305, not followed.

Gopal Chandra Pal v *Kadambini Dasi*, A.I.R. 1924 Cal. 364; *Jeot Ram* v. *Mt. Lauji*, A I R. 1929 All. 751 and *Bhagwanti* v. *Thakur Mall*, A.I.R. 1926 Lah 198 considered.

Second appeal against the decree of the Court of the Subordinate Judge of Amalapuram in Appeal Suit No. 103 of 1929 preferred against the decree of the Court of the District Munsif of Razole in O.S. No. 13 of 1929 (O.S. No. 401 of 1926—District Munsiff's Court, Amalapuram).

K. Bhimasankaran for Appellants.

V. Viyanna for Respondent.

The Court delivered the following

JUDGMENT:—This appeal raises an important question regarding the right of maintenance. The respondent is the widow of one of the sons of one Surayya. Her husband died in 1920. In 1923 Surayya became a Sanyasi after executing and registering a document described as a will (Ex. IV-C). In that will he bequeathed his self-acquired properties to his grandsons (defendants 3 and 4 in the suit) who are respectively the sons of Surayya's two other sons (defendant 1 and defendant 2). Surayya handed over his properties to his grandsons, and thereafter disappeared out of their lives. In 1926 the respondent sued the four defendants for maintenance and in both of the Courts below she has obtained a decree for maintenance against defendants 3 and 4, which is also charged upon the property acquired by them under Ex. IV-C. Defendants 3 and 4 have now filed this second appeal, and in our opinion the appeal must succeed.

The construction of Ex. IV-A need not delay us long. Though it appears to have been treated throughout the trial and the first appeal as a will which spoke from the day on which Surayya renounced his civil rights, we think it should be more properly styled a gift deed which came into effect when possession of the properties was actually given to the appellants but whether it will be a will or a gift deed, we think the principles upon which any rights of the respondent to maintenance are or are not affected by it are the same.

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We begin the discussion of the question before us by enunciating two propositions of law which are well established and have not been contested.

(*i*) A widowed daughter-in-law has no legal right to maintenance from her father-in-law out of his self-acquired property but only what is called a moral right, and

(*ii*) But if on her father-in-law's death that property descends by inheritance to his heirs her moral right becomes a legal right at the moment of his death, as against them and as against the property which they have so inherited.

The point which now arises for determination is:

"Does she acquire a similar legal right against the devisee or donee of self-acquired property or against the property itself if it descends not by inheritance but by will or gift."

Now in discussing this matter the first thing which strikes us is that the second proposition of law which has been enunciated above is a very startling one, and we immediately ask ourselves the question:

"Why should an estate which is unburdened in the hands of one owner become burdened in the hands of a second owner who acquires it from him."

This is contrary to all general provisions of law, and it must be due to some peculiarity in the nature of the death of a Hindu and of succession to his property. The answer is given in *Janki* v. *Nand Ram*[1] in these words:

"An essential element of the son's right of inheritance from his father is the spiritual benefit which in the contemplation of the Hindu Law the son confers upon the soul of his deceased father. Therefore the son inheriting the self acquired property of his father takes that property subject to such moral obligations as are conducive to the spiritual benefit of his father, and that such moral obligations become legal obligations as against the son who holds his father's property by inheritance."

Now it is true, of course, that this may not be the only answer, but throughout the long arguments in this case that was the only answer that the learned advocate for the respondent could give, or that appears in the authorities which he brought to our attention. Let us therefore examine whether this answer can be pressed into service in the case of a will or gift. It seems to us obvious that it cannot. It is impossible to argue that there is anything in the nature of the transference of

1. (1888) I.L.R. 11 All. 194 at 208 (F B.).

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property by will or by gift which requires that the legatee or donee should take any thought for the spiritual welfare of the testator or donor. The legatee or donee may be a stranger, may be a Muhammadan, may be a Christian, may be anybody; and, as has happened in this case, the donor may expressly say that his widowed daughter-in-law is *not* to be maintained. The essence of the idea of inheritance is that only the heir-at-law can succeed—the essence of the idea of a will or a gift is that the testator or donor is disposing personally and at this own will and pleasure, of the property which he possesses. The Bombay High Court, it may here be mentioned, has consistently held the view that the widow acquires no legal right in circumstances like the present (see *Yamunabai* v. *Manubai*[1], *Bai Parvati* v. *Tarwadi Dolatram*[2] and *Bhagirathi bai* v. *Dwarkabai*[3]) and has drawn a clear distinction between the acquisition of a father's property by inheritance and by other means such as a will.

There is however an important pronouncement in a case in Madras (which has been followed in Calcutta and Allahabad) and it is necessary to discuss this before finally disposing of this appeal. The case *Rangammal* v. *Echammal*[4] is reported in I.L.R. 22 Mad. at p. 305 and Subramania Aiyar, J. is there dealing with the very question which is now before us namely, whether a widow acquires a legal right to maintenance out of the self-acquired property of her father-in-law which had been bequeathed by will. What the learned Judge says is this:—

"The better conclusion is, perhaps, that the party whose moral claim becomes a legal right would not be affected by testamentary dispositions in favour of volunteers made by the person morally bound to provide the maintenance. No doubt, if the title of the female claiming the maintenance were dependent on the volition of such a testator he could, by his will, have directed that she should get no maintenance out of his estate. But in cases like this, her claims to maintenance originating from the status acquired by her marriage, becomes a legal right independently of his volition and comes into existence at the same moment as the dispositions in favour of the volunteer become operative. It is consequently difficult to see how the latter could affect the former. It is not, however, necessary to put our decision in favour of the appellant on this ground."

It will at once be clear from this quotation that what Subramania Aiyar, J., says, though deserving of the very

1. (1899) I.L.R. 23 Bom. 608 at p. 611.
2. (1900) I.L.R. 25 Bom. 263.
3. A.I.R. 1933 Bom. 135.
5. (1898) 9 M.L.J. 14 : I.L.R. 22 Mad. 350.

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greatest respect, does not lay down the law in the full sense of that term. It is expressly made *obiter dictum*, and is prefaced by the word 'perhaps' which can hardly suggest that the learned Judge had finally made up his mind. We ourselves are again, with great respect, unable to follow him. He does not cite any test or any authority in support of his statement of the law. He does not say *why* the right to maintenance is independent of the volition of the testator. His argument really in our opinion amounts to this, that the right to maintenance is *charged upon* the testator's self-acquired property, and that he cannot get rid of the charge. But if the widow has no legal claim against him during his lifetime it cannot be charged on his property. We return to what we said when considering the distinction between inheritance and the passing of property by will or gift, and repeat that we can see no valid reason why the right of a Hindu to dispose of his self-acquired estate should be in any manner restricted.

The rulings in *Gopal Chandra Pal* v. *Kadambini Dasi*[1] and *Jeot Ram* v. *Mt. Lauji*[2] in our opinion merely accept and follow *Rangammal* v. *Echammal*[3] without attempting any analysis or examination, and cannot advance the case of the respondent any further. On the other hand we are fortified in our conclusion by *Bhagwanti* v. *Thakur Mall*[4], where it is laid down without qualification (though without, it is true, considering specifically the case of a will) that "a man has absolute right under the Hindu Law to dispose of his self-acquired property in any way he chooses."

For these reasons we think that the decrees of the Courts below cannot be supported. The appeal is allowed and the plaintiff's suit dismissed with costs throughout. The plaintiff must pay the court-fee due to Government on her plaint.

B.V.V. ——— *Appeal allowed.*

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1. A.I.R. 1924 Cal. 364. 2. A.I.R. 1929 All. 751.
3. (1898) 9 M.L.J. 14 : I.L.R. 22 Mad. 305.
4. A.I.R. 1926 Lah. 198.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

N. Swaminatha Aiyar and another .. *Appellants** (*Claimants Nos. 7 and 8*)

v.

Kuppuswami Aiyar *alias* Ramaswami Aiyar and others .. *Respondents* (*Claimants Nos. 79 to 82 and 6*).

Swaminatha Aiyar *v.* Kuppuswami Aiyar.

Land Acquisition Act (I of 1894), S. 31—Compensation money deposited in Court—Rival claimants—Duty of Court to decide—Referring party to fresh suit—Permissibility.

When rival claimants come before the Court under S. 31, Land Acquisition Act, the Court has a duty to decide which of the two claimants is entitled to the money deposited in Court.

The Land Acquisition Act makes provision for the securing of funds in cases where the person entitled to the custody of them is incompetent to alienate them; but it does not make any provision whereunder the Court can say "Claimant *A* has a good case. Claimant *B* also has a good case, but meanwhile I confirm the decision of the lower Court in favour of claimant *A*." In such a case the court must decide the matter which is before it.

Babujan v. *The Secretary of State for India in Council and the Chairman, Gaya Municipality*, (1906) 4 C.L.J. 256, referred to.

Appeal against the decree of the Court of the District Judge of Salem in A.S. No. 30 of 1935 preferred against the decree of the Court of the Subordinate Judge of Salem in Land Acquisition Case No. 136 of 1930.

B. Sitarama Rao for Appellants.

P. J. Kuppanna Rao and *K. S. Sundaram* for Respondents.

The Court delivered the following

JUDGMENT.—The appellants and the respondents were claimants of money deposited in Court under S. 31 of the Land Acquisition Act. They represented different branches of one family which owned originally certain lands handed over under Ex. XVIII to one Ramaswami Aiyar the ancestor of the respondents, who was to perform certain charitable trusts and keep any surplus which there might be after the performance of those trusts. The lands now acquired by the Government consist of a portion of the land covered by this dedication; another portion has been previously acquired and out of the proceeds arrangement has been made for the income necessary to carry out the trusts. The respondents as descendants of the original manager of the trust claimed an exclusive right in the

* Second Appeal No. 183 of 1936. 19th August, 1938.

proceeds of the present acquisition. The appellants on the other hand claimed that they were entitled to a share. The trial Court went into the matter and decided that the appellants were not entitled to any share in the compensation amount and that it was payable entirely to the respondents descendants of Ramaswami Aiyar. There was an appeal by the present appellants (claimants 7 and 8) to the District Judge, who dismissed the appeal with a very short judgment in the course of which he observes that neither the contention of the appellants nor the contention of the respondents appears to him to be unsubstantial and accordingly while confirming the award made by the Subordinate Judge he leaves it open to the parties to sue in regular form for the adjustment of their mutual claims and remarks that the appellants may, if so advised, ask for the attachment *pendente lite* of the disputed amount.

Now whatever this order was intended to mean, it appears to me to have the effect of confirming the decision of the Subordinate Judge which recognises the title of the respondents and at the same time of leaving it open to the appellants to canvass the correctness of that decision by means of a separate suit. It seems to me that the learned District Judge had no power to come to such an ambiguous decision. When rival claimants come before the Court on a reference under S. 31 of the Land Acquisition Act, the Court has a duty to decide which of the two claimants is entitled to the money deposited in Court. The Act makes provision for the securing of funds in cases where the person entitled to the custody of them is incompetent to alienate them; but it does not, so far as I am aware, make any provision, whereunder the Court can say,

"Claimant *A* has a good case. Claimant *B* also has a good case. I direct them to go to a Civil Court to establish their case, but meanwhile I confirm the decision of the lower Court in favour of claimant *A*."

The Court must decide the matter which is before it. In the case of *Babujan* v. *The Secretary of State for India in Council and the Chairman, Gaya Municipality*[1], when the Court was asked to leave the question of title between the claimants open for determination in a regular suit, the learned Judges observed:

"We think that wherever a question of title arises between rival claimants, it must under the terms of the Act be decided in that case and cannot be made the subject of a separate suit."

1. (1906) 4 C.L.J. 256 at 258.

Swaminatha Aiyar v. Kuppuswami Aiyar.

It is moreover well established that the decision on a reference under the Land Acquisition Act on a question of title operates as *res judicata* to bar persons who are parties to that decision from agitating their title in separate proceedings. If the District Judge's order were left as it stands, the appellants suing to establish their title to this money as the learned District Judge seems to think they can sue, would be met by the plea that the learned District Judge's own decision confirming the decision of the trial Court operates as *res judicata* to bar the suit. Clearly the rights of the parties in this money must be decided by the Land Acquisition Court itself and by the District Court in Appeal from the Court which heard the actual reference. The District Judge was therefore wrong in confirming the trial Court's decision while at the same time referring one party of claimants to a separate suit. The appeal is therefore allowed and remanded to the District Court for disposal in the light of these observations. Costs will abide by the result. The court-fee will be refunded to the appellants.

B.V.V. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO.

Puthiamatathummal Peringadi Assankutti and others .. *Appellants* (Plaintiffs 2 to 4)*

v.

Peedikayilakath Mammad and others .. *Respondents (1st Defendant, 1st Plaintiff and Defendant No. 6).*

Puthiamatathummal Peringadi Assankutti v. Peedikayilakath Mammad.

Malabar Law—Tavashi—Karnavan doing separate trade—Members of tavashi allowing him to do business—Acquisitions with nucleus lent by tavashi—Nature of acquisitions in the circumstances—Presumption in law how far permissible.

There is no presumption in law that when a Malabar family is joint, it possesses any joint property or that all the property possessed by it is joint property. When a property stands in the name or is in the possession of a member of a family, it is incumbent upon those who assert that it is joint family property to establish it. Where it is proved or admitted that a family possesses sufficient nucleus with the aid of which any member might have made the acquisition, the law raises a presumption that it is joint family property and the onus is shifted on to the individual member to establish that the property was acquired by him without the aid of that nucleus. Whether the presumption should be raised and the burden of proof should be shifted

* S. A. No. 616 of 1937. 17th October, 1938.

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at all and what weight should be given to the said presumption depend on the facts and circumstances of each case. The presumption aforesaid is one which the law raises where nothing is known except the bare fact of a nucleus and the acquisition.

Where with the consent of the members of a tavazhi an individual member or karnavan is allowed to have separate trade and acquire properties, the presumption ought to be that property acquired in the name of the individual member is separate property even though he might have moneys of the tavazhi in his hands. It is not enough to show that he has tavazhi moneys in his hands wherewith the acquisition might have been made. It is not even enough to show that the tavazhi moneys were utilised in the business. When members of a tavazhi allow a karnavan or an individual member to acquire property separately with full knowledge that he has tavazhi moneys in his hands, it may well be that the tavazhi allowed him to use those moneys, but profits or property acquired therefrom for himself cannot be claimed as joint family property, though the member may be accountable to the tavazhi for the moneys so utilised. Such moneys in fact would be advances or loans made by the members of the family to the individual member or the manager.

Appeal against the decree of the District Court of North Malabar in A. S. No. 180 of 1936 preferred against the decree of the Court of the District Munsif of Badagara in O. S. No. 939 of 1932.

P. Govinda Menon for Appellants.

Srinivasaraghavan and *Thiyagarajan* for Respondents.

The Court delivered the following

JUDGMENT.—The question for decision in this second appeal is whether the suit Pandikasala, that is, the warehouse, was the separate property of one Kunhi Tharuvayi Haji or the property of the first defendant's tavazhi. The site of the said warehouse together with certain buildings thereon were purchased on 15th January, 1922, by Poovanthankandi Hassankutti Company of which Kunhi Tharuvayi Haji was a partner. After the purchase, the firm also effected certain improvements. The firm closed its business in or about 1916. The accounts of the said business were looked into and a deed of dissolution was executed between the partners in or about January, 1920, as evidenced by Ex. K. Under the deed of dissolution the site of the warehouse and the buildings thereon were allotted to the share of Kunhi Tharuvayi Haji. It was stated in the deed that a sum of Rs. 4,600 was due "being the balance due to him after deducting the receipts and expenses from and out of the total sums due to him for his share of the profits and assets,"

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and there was a covenant by the partners to the following effect:

"We have also authorised No. 2 (Kunhi Tharuvayi Haji) to hold possession of the said properties and to create alienations in respect thereof as he pleases."

Subsequent to the acquisition of this property, Kunhi Tharuvayi Haji demolished certain structures and built the suit Pandikasala at a cost of over Rs. 3,000. He appears to have been letting it and realising income therefrom. In 1929 he let it to the first plaintiff. In or about October, 1929, K. T. Haji died and disputes arose between his wife and children and the tavazhi in regard to the title to the property. On the 5th March, 1930, Abdulla the then karnavan sent a registered notice to the plaintiff claiming the property as tavazhi property. A similar notice was given by the wife and children claiming the property as the sole property of K. T. Haji to which they were entitled to succeed as his heirs. In consequence of the disputes thus raised the first plaintiff filed an interpleader suit on 19th December, 1932. The first defendant was impleaded as the karnavan of the tavazhi, Abdulla having died in the meanwhile, defendants 2, 3 and 4 being the sons and the fifth defendant being the wife of K. T. Haji. The second defendant died subsequent to the institution of the suit and his wife was added as the sixth defendant. Defendants 3, 4 and 5 were subsequently transposed as supplemental plaintiffs 2 to 4 in the suit. Both the wife and children and the first defendant filed statements asserting their respective claims to the property. The said Tharuvayi Haji was karnavan of his tavazhi for several years up to the date of his death. It is conceded that while he was the karnavan he was allowed to carry on separate trade and have separate acquisitions. Similarly his brother Abdulla was allowed to do so. This fact was admitted in a family karar Ex. G dated 9th June, 1911, between the members of the family. On the date of the said karar, K.T. Haji was the karnavan. He was party No. 1 to the deed and his brother Abdulla, party No. 2. In regard to the firm of Assankutti Company, wherein K.T. Haji was a partner, there occurs the following recital:

"The assets that may be found as due to No. 1 in respect of the partnership trade carried on by No. 1 under name of Kelluvalappil Assankutti Haji and Company and in respect of the trade carried on by him under the name of Mukkathumprath Poovathankutty Assankutti Company from the self-acquisition of No. 1 . . . . . . As regards the property and assets belonging to No. 1 as his own as mentioned above, No. 1 has executed a will bequeathing

the said property and assets to be enjoyed by his wife and children after his death."

A similar recital was made in regard to No. 2. Abdulla to the effect that he was carrying on a partnership business with one Mammad Kutti Haji and that the assets of that trade form his self-acquisition and that he could deal with them as he pleased. The will referred to is Ex. H dated 9th June, 1911, wherein K. T. Haji has stated that the partnership trade carried on by him is his own and he has stipulated that all the assets, goods and properties which will pertain to his share would go to his wife and children after his death. It is thus clear that the family recognised the assets of the individual trade carried on by both K. T. Haji and Abdulla as their own and the acquisitions made therefrom were the properties wherein the tavazhi had no concern. It is also admitted that even after the dissolution of the said Assankutti Company, K. T. Haji up to the date of his death was carrying on independent trade and having separate moneys of his own and the family claimed no sort of concern or interest therein. In his deposition the first defendant makes the following admission:

"The trades which K. T. Haji had in partnership in Assan Company and other companies were his own. None of the trades in which he had interest was tavazhi trade. We were not taking part in that trade."

The main ground on which the first defendant claimed the property for the tavazhi was that though the trade carried on by Assankutti Company was a trade in which the tavazhi had no interest, still a greater portion of the money, namely, a sum of Rs. 3,600 was tavazhi money and therefore the acquisition itself by K. T. Haji was for the tavazhi and also the moneys expended for the re-building and the construction of Pandikasala were tavazhi moneys, because K. T. Haji as karnavan was having considerable family income in his hands. The learned District Munsif on a consideration of the entire evidence and the probabilities of the case negatived the contentions of the first defendant, declared the property to be the separate property of K. T. Haji and gave appropriate reliefs by way of possession and payment of rent to the plaintiffs 2 to 4. The learned District Judge reversed this decision holding that the property must be deemed to be the tavazhi property.

To say the least the judgment of the learned District Judge is unsatisfactory. He purports to decide the case on certain assumptions of fact and on certain presumptions of law

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without reference to the actual facts proved or established in the case. In paragraph 8 he observes thus:

"It is true that he (K. T. Haji) was a partner in the firm in his personal capacity and not as karnavan of the tavazhi. But Ex. K shows that as such partner he was entitled only to Rs. 1,112 for his share of the partnership. But the amount shown as due to him from the firm was Rs. 4,600 The balance was obviously money due to the tavazhi."

It has been frankly conceded by Mr. Thiagarajan that Ex. K does not support this statement and therefore there is no warrant for this assumption of the learned Judge. Again, the learned District Judge observes thus:—

"The appellant's first contention is that a major portion of the sum of Rs. 4,600 found due to K.T. Haji from the firm was tavazhi money and hence the site of the plaint warehouse and the structures thereon, which were allotted to him under the deed of dissolution, should belong to the tavazhi. The account books of the firm (Exs. VII to XVI) bear out this contention."

This assumption also is wrong. There is absolutely no document to show how this sum of Rs. 4,600 was arrived at. Exs. VII to XVI do not all relate to the books of Assankutti Company; only Exs. VII to XIII relate to the said company. But even the said books are not complete. It does not appear from those books nor from any books produced by the first defendant that a sum of Rs. 3,600 out of Rs. 4,600 represented tavazhi money. So far as regards assumptions of fact.

Coming now to presumptions of law, the learned District Judge observes thus:

"After the dissolution, as is seen from Ex. O, K. T. Haji spent about Rs. 3,810 for the construction of the plaint warehouse. The question is whether this amount represents tavazhi money or his private funds. It is admitted now that K. T. Haji had large private funds and was able to command the money required for the construction of the warehouse. But it is also admitted that he was the karnavan of the tavazhi and that he was in possession of tavazhi money . . . . . In this state of the evidence, the necessary legal presumption is that the plaint property is *prima facie* a tavazhi asset. The presumption is liable to be rebutted by the production of evidence to show that the deceased in fact utilized only his private funds for the construction of the building . . . . They (defendants 2 to 4) having failed to establish that the private funds of the deceased were utilised for the construction, the ordinary presumption must prevail, and it must be held that the plaint building was constructed with tavazhi funds."

The learned District Judge has misdirected himself to the presumptions of law which should govern this case. There is no presumption that when a family is joint, it possesses any joint property or that all the property possessed by it is joint property. When a property stands in the name or is in the possession of a member of a family, it is incumbent upon those who

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assert that it is joint family property to establish it. Where it is proved or admitted that a family possesses sufficient nucleus with the aid of which the member might have made the acquisition, the law raises a presumption that it is joint family property and the onus is shifted to the individual member to establish that the property was acquired by him without the aid of that nucleus. Whether the presumption should be raised and the burden of proof should be shifted at all and what weight should be given to the said presumption depend on the facts and circumstances of each case. The presumption aforesaid is one which the law raises where nothing is known except the bare fact of a nucleus and the acquisition. But there are cases where the presumption is not allowed to be raised. For example, in *Bengal Insurance and Real Property Co., Ltd.* v. *Velayammal*[1], the question was whether the money due under a Life Insurance Policy belonged to the member who insured it or to the joint family and the contention raised on behalf of the joint family was he had enough joint family money in his hands wherewith he could have paid the premia. It was held in that case that as he had also money available from private sources to enable him to pay the premia, the presumption is that the assured paid the premia out of his own money and it was his separate property. Where again with the consent of the members of the family an individual member including a manager is allowed to have separate trade and acquire properties, the presumption ought to be that the property acquired in the name of the individual member is separate property even though he might have moneys of the joint family in his hands. It is not enough to show that he had family money in his hands wherewith the acquisition might have been made. It is not even enough to show that the family moneys were utilised in the business. When members of a family allow a manager or an individual member to acquire property separately with full knowledge that he has joint family moneys in his hands, it may well be that the family allowed him to use those moneys, but profits or property acquired therefrom for himself cannot be claimed as joint family property, though the member may be accountable to the family for the moneys so utilised. Such moneys would be in fact advances or loans made by the

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1. I.L.R. (1937) Mad. 990.

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members of the family to the individual member or the manager. In this case the individual members including every successive manager were allowed to carry on their own trade. The first defendant admits that he is carrying on his own trade.

So far as the original acquisition is concerned, namely, the acquisition of the site on which the Pandikasala was built, it was out of partnership funds and therefore it was partnership property. But the contention urged is that the acquisition under the deed of dissolution by K. T. Haji must be deemed to be the family property. Ex. K itself is against this contention. The property was allotted to K. T. Haji as his share of profits and assets. *Prima facie* therefore it would be his individual property. Further the clause which states that K.T. Haji can hold possession and create alienations in respect thereof as he pleases seems unmistakeably to indicate that he took it as his own property and not on behalf of the family. But it is urged that a considerable portion of the sum out of Rs. 4,600 for which the property was allotted represented tavazhi money and therefore it must be presumed that he intended to take the property for the tavazhi. As I have already stated, there is no warrant for this assumption and I think the learned District Munsif was correct in stating that the contention is not supported by any positive evidence and does not deserve any consideration. What is urged is that both in regard to the acquisition and in regard to the subsequent construction he was mixing tavazhi moneys with his own moneys and it was incumbent upon him to have maintained separate accounts so as to indicate without any possibility of doubt what moneys were utilised by him either for the acquisition or for the construction, and as he has failed to do so, it must be presumed that it was the tavazhi income that contributed to the purchase and the construction. It will be seen that so far as the tavazhi books are concerned, they were not produced by the first defendant. The learned District Munsif says that so far as the account books for the relevant period are concerned, they must have come into the possession of the next karnavan Abdulla. The income and the expenses of the tavazhi would find a place in those accounts. From the suppression of the said accounts by the first defendant in view of the admissions made by him that the concerns in which K.T. Haji was engaged are his own, the Court is entitled to draw the inference that the contention now

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put forward by him is not true. The learned District Judge curiously enough would make no reference to the non-production by the first defendant of tavazhi books for the relevant period. So far as the account books relating to private earnings maintained by K. T. Haji himself are concerned, all the relevant books are not produced. But if the books separately maintained by K.T. Haji in respect of his private earnings were the only books on which reliance could be placed, there may be considerable force in the observation of the learned District Judge that from the suppression of those books an adverse inference can be drawn against the case of the plaintiffs. But where the material books are the books of the tavazhi and they have not been produced, I think no inference adverse to the plaintiffs can be drawn. Again, all the relevant books of Assankutti Company are not available and it is not possible to know with whom the said books are, because so far as the collection of debts or outstandings and payment of debts are concerned, it was left to one of the partners of the firm of Poovathankandi Hassan Kutti. Therefore, from the accounts produced on either side it is not possible to state whether there was any net income from the tavazhi available from which a presumption can be drawn that the suit property could have been acquired and built from those funds, even assuming that such a presumption can be drawn. I shall assume that it is not possible to say whether the first defendant is in possession of the tavazhi books or not and what the deceased K.T. Haji did with them it is not possible to predicate. But still the first defendant could have let in evidence to show what exactly was the income realised from the tavazhi property, what were the outgoings therefrom, that is, repairs, taxes, etc., and what were the expenses for the maintenance of the family and what was the net income available. No attempt has been made by the first defendant with regard to that excepting by way of his oral statement that the family gets Rs. 2,500. But a perusal of his evidence shows that his statement that the tavazhi had an income of Rs. 2,500 cannot be accepted as correct. He says:

"I am keeping accounts. It will show that the tavazhi has an income of Rs. 2,500. I cannot say exactly what revenue is payable or jenmi's rent or income-tax. I cannot say what will be the expenses in connection with the properties. I have debts on account of my trade. After I became a karnavan there was a decree to the extent of Rs. 800 against the tavazhi."

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If the family had a net income of Rs. 2,500 as he says, it not possible to understand why he allowed a decree to be passed against the tavazhi for Rs. 800. At any rate, it was incumbent upon him to establish by evidence which was certainly available to him what the net income of the family was and what could have been the income available in the hands of K. T. Haji. In the absence of such proof and in the face of the admission that K.T. Haji had large private funds of his own acquired in independent trades, the inference seems to be irresistible that the property in the circumstances of this case is the separate property of K.T. Haji and the finding of the learned District Munsif on the evidence and the probabilities of the case is perfectly sound.

It is urged again by Mr. Thayagarajan that the deceased K.T. Haji mixed his private income with the tavazhi income and the presumption raised by the learned District Judge that he intended to utilise his private funds for the tavazhi and the acquisition must be deemed to be on behalf of the tavazhi, is correct. But a mere mixture of itself would not effect a blending so long as accounts are kept. In this case accounts were kept. If the tavazhi books for the relevant period had been produced, what the family income and expenditure were could have been ascertained. The books produced by the plaintiffs show that he was noting therein both his private expenditure and family expenditure. So no presumption of blending can be raised in this case.

Mr. Govinda Menon does not controvert the position that K. T. Haji was accountable to the family for any moneys retained by him during the course of his management and if it is shown that any portion of the moneys went towards the purchase or the reconstruction of the suit property, the tavazhi might have a claim against the assets of K.T. Haji in the hands of plaintiffs 2 to 4 and the fifth defendant. I do not propose to go into those questions because all the evidence is not available before me on which to pronounce an opinion. It is open to the tavazhi, if they can, to prefer any claim they may have against the legal representatives of K.T. Haji.

I therefore allow the second appeal, set aside the decree of the learned District Judge and restore that of the learned District Munsif, but, as plaintiffs 2 to 4 were also at fault in not producing all the account books in their possession or in not

sufficiently accounting for their non-production, I direct both the parties to bear their own costs of suit. But the first defendant will pay Rs. 21-8-9, the costs directed to be paid to the first plaintiff by the learned District Munsif.

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Leave to appeal refused.

K. C. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN.

K. Manaithunainatha Desikar .. *Petitioner* (Plaintiff)*

v.

Gopala Chettiar and others .. *Respondents (Defendants).*

Manaithunainatha Desikar v. Gopala Chettiar.

Civil Procedure Code (V of 1908), S. 115—Order determining court-fee payable on plaint—Whether revisable—Suit to establish right to joint trusteeship—Prayer for injunction and possession—Relief for declaration necessary—Court fee payable—Court-Fees Act, 1870, S. (7) (iv) (c).

An order of the trial Court determining the proper court-fee payable on a plaint and holding that it is insufficiently stamped is not revisable by the High Court; and such an order, which by itself does not fall within the terms of S. 115, Civil Procedure Code, cannot be revised by the High Court merely because it is bound to be followed by some other order which may be without jurisdiction.

Kulandai Pandichi v *Ramaswami Pandia Thalavan*, (1927) 55 M.L J. 345: I.L.R. 51 Mad 664, distinguished.

Sudali Muthu Pillai v. *Sudali Muthu Pillai*, (1922) 17 L.W. 623; *Sudalimuthu Pillai* v. *Peria Sundaram Pillai*, (1924) 48 M.L.J. 514 and *Venkata Ramani Aiyar* v. *Narayanaswami Aiyar*, (1924) 48 M.L.J. 688, not followed.

Where a person sued for a permanent injunction restraining the defendants from interfering with the plaintiff's joint possession of the suit properties as joint trustee and if necessary to put the plaintiff in joint possession of the office of trusteeship and of the properties described in the plaint, but it appeared from the plaint as a whole that the plaintiff could not succeed either as regards the relief of injunction or the relief of possession unless his right to be a joint trustee was declared,

Held, that the suit was really a suit for a declaration with consequential relief and that the plaint was leviable to court-fee under S. 7 (*iv*) (*c*) of the Court-Fees Act.

Petition under S. 115 of Act V of 1908, and S. 224 of the Government of India Act, praying the High Court to revise the order of the Court of the Subordinate Judge of Tiruvarur dated 21st July, 1938 and made in O.S. No. 4 of 1937.

R. Sundaralingam for Petitioner.

The Government Pleader (B. Sitarama Rao), M. Lakshman Nayak, M. R. Venkataraman, T. K. Rajagopalan and *K. Venguswami Aiyar* for Respondents.

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* C.R.P. No. 798 of 1938. 18th November, 1938.

Manai-thunainatha Desikar v. Gopala Chettiar.

The Court delivered the following

JUDGMENT.—This is an appeal from the order passed by the learned Subordinate Judge of Tiruvarur in O.S. No. 4 of 1937 directing the plaintiff to pay additional court-fees over and above the amount paid with the plaint. I have advisedly called it an appeal because that is what it really is though it purports to be a Revision Petition. The petitioner has no fault to find with the order of the learned Sub-Judge, except that on its merits it is wrong. I am clearly of opinion that this is not a matter falling under S. 115, Civil Procedure Code.

The suit was one for a permanent injunction to restrain the defendants from interfering with the plaintiff's joint possession of the suit properties as joint trustee and if necessary to put the plaintiff in joint possession of the office of trusteeship and of the properties described in the plaint. A contention was raised before the learned Subordinate Judge that the court-fee paid was not sufficient and issue 9 was framed in this form "has proper court-fee not been paid?" The learned Subordinate Judge has examined the terms in which the plaint is cast and has discussed various cases and has decided that the plaint was insufficiently stamped. He has concluded that the suit was really a suit for a declaratory decree with consequential relief and if that be so his decision that the suit falls under S. 7 (*iv*) (*c*) of the Court-Fees Act is correct. It is not contended before me that the learned Subordinate Judge had no jurisdiction to decide what was the proper court-fee. On the other hand learned Counsel for the petitioner has agreed that the learned Subordinate Judge had full jurisdiction to decide this matter. It has not been alleged either in the petition or in argument that the learned Subordinate Judge in the exercise of his jurisdiction to decide this question has acted illegally or with material irregularity. It is therefore impossible to bring this case within the terms of S. 115, Civil Procedure Code.

I have been referred to several cases in which I am told that learned Judges of this Court have interfered in circumstances similar to these. The only case decided by a Bench of this Court to which my attention has been drawn is the case of *Kulandai Pandichi* v. *Ramaswami Pandia Thalavan*[1]. In

1. (1927) 55 M.L.J. 345 : I.L.R. 51 Mad. 664.

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that case Mr. Justice Kumaraswami Sastri and Mr. Justice Wallace held that where the lower Court passed an order directing the plaintiff to pay additional court-fees on an erroneous view of the court-fee payable, and refused to proceed with the suit unless such sum was paid, the High Court will entertain a revision petition to set aside the order, although an appeal would lie later on on the consequential order that might be passed by the lower Court if the additional stamp duty was not paid. That case is clearly distinguishable from the one now under consideration. The learned Subordinate Judge has not in this case refused to proceed with the suit. He has decided what is the proper court-fee in his opinion and he has ordered the plaintiff to pay court-fees accordingly. In doing so he has done no more and no less than his duty. All that he has done in addition to this is to order on the 21st July, 1938, that the suit be called again on the 4th August, 1938, for the plaintiff to pay the deficit court-fees. I am unable to see in what way the learned Subordinate Judge can be said to have failed to exercise any jurisdiction in this case. He has not refused to proceed with the suit and therefore this case does not fall within the principle of *Kulandai Pandichi* v. *Ramaswami Pandia Thalavan*[1]. I am aware that single Judges of this Court have taken the view that the order of a Subordinate Court determining the amount of court-fee payable by a plaintiff is liable to be revised when it is unfavourable to the plaintiff and I am aware that there is a decision of a Bench of this Court in the case of *Secretary of State for India* v. *Raghunathan*[2] to the effect that the Crown cannot be heard in revision when the decision of the Court on the subject of court-fees is favourable to the plaintiff and unfavourable to the Government. On the other hand, there are several decisions of single judges to the effect that an order determining the proper court-fee is not liable to be revised under S. 115. *See* the case reported in *Acha* v. *Sankaran*[3] and the decision unreported of Waller, J., in C.R.P. No. 451 of 1926.

But (I say it with all respect) none of the learned Judges who, sitting singly, have held that a mere decision as to the amount of court-fee is revisable has explained how it can be said that such a case falls within S. 115, Civil Procedure Code.

1. (1927) 55 M.L.J. 345: I.L.R 51 Mad. 664.
2. (1933) 65 M.L.J. 25: I.L.R. 56 Mad. 744.
3. (1926) 50 M.L.J. 497.

Manai-thimainatha Desikar v. Gopala Chettiar.

In the case of *Sudali Muthu Pillai* v. *Sudali Muthu Pillai*[1], Mr. Justice Oldfield held that revision was possible. But that was clearly because the order determining the amount of court-fee included an order directing the dismissal of the appeal in case the payment were not made. The reasoning was that in dismissing the appeal the lower Court had acted without jurisdiction (assuming that the decision on the question of court-fee was wrong). In *Sudalimuthu Pillai* v. *Peria Sundaram Pillai*[2], Mr. Justice Krishnan held that a revision would lie to the High Court against the erroneous order of the Subordinate Judge as to the proper court-fee payable, expressing the opinion that it was open to the Court to interfere because the question was really one of jurisdiction as the plaint would have to be rejected if proper stamp duty was not paid and that the remedy by way of appeal was a cumbrous remedy. A similar view was taken by Mr. Justice Venkatasubba Rao in *Venkata Ramani Aiyar* v. *Narayanaswami Aiyar*[3]. With all respect to those learned Judges I am of opinion that their decisions were incorrect. It is not possible in a case like this to say that the lower Court has acted without jurisdiction or has refused to exercise any jurisdiction vested in it. All that can be said on the question of jurisdiction (and some of the learned Judges say it explicitly) is that although so far the lower Court has acted well within its jurisdiction, if the High Court does not interfere at this stage the lower Court will go on at some time in the future to do something which (if its decision on the matter of court-fees is wrong) will be without jurisdiction. In the present case for example the argument is that if the order of the lower Court is not revised, the lower Court will be obliged, when the plaintiff declines to pay the additional court-fee, to reject the plaint. Assuming that the lower Court's decision on the question of court-fee is wrong, that order of rejection of the plaint will be without jurisdiction. Therefore, it is urged, the High Court should interfere now. In my humble opinion this argument is unsound. An order which by itself does not fall within the terms of S. 115, Civil Procedure Code, cannot be revised by this Court merely because it is bound to be followed by some other order which *may* be without jurisdiction. Moreover, it is not possible to say with absolute certainty

1. (1922) 17 L.W. 623.
2. (1924) 48 M.L.J. 514.
3. (1924) 48 M.L.J. 688.

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in the present case that the learned Subordinate Judge will be obliged to reject the plaint. It is quite conceivable that the plaintiff may decide to pay court-fees as prescribed by the learned Subordinate Judge. If he does, no question of rejection of his plaint will arise. Even if he does not it is not beyond the bounds of possibility that the learned Subordinate Judge may discover, or think, that he has made a mistake in the order now under appeal and may cancel his demand for extra court-fees. Whatever the future may bring forth, I am quite clear on this point, that the learned Subordinate Judge so far has done nothing beyond his jurisdiction and has not refused to exercise any jurisdiction vested in him by law. His order, determining the proper court-fee is not liable to be revised under S. 115, Civil Procedure Code. On this ground alone I would dismiss this application.

Since I have heard the matter on the merits, I will give my opinion on the merits also. I consider that the decision of the learned Subordinate Judge was perfectly right. The plaintiff prays only for an injunction against the persons with whom he says he is a joint trustee, and if necessary for joint possession along with them. But it is quite clear from the plaint as a whole that his right to be a joint trustee is disputed by several of the defendants and that he cannot possibly get either the injunction or the relief for possession unless his right to be a joint trustee is declared.

This application is therefore dismissed with costs of the Government Pleader.

B.V.V. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW.

Jambulingam Pillai .. *Petitioner** (*Accused*)

v.

Ponnuswami Pillai .. *Respondent* (*Complainant*).

Jambulingam Pillai v. Ponnuswami Pillai.

*Indian Penal Code (XLV of 1860), Ss. 425 and 426—Occupiers of neighbouring houses—Complainant projecting poles on accused's property—Accused removing the projections—Damage caused to complainant's house—Whether punishable offence committed in the circumstances—*Mens rea *not existing.*

Mens rea is one of the essential ingredients of an offence under S. 425, Indian Penal Code and if the accused honestly believed in good faith that he

* Crl. R. C. No. 495 of 1938. 14th December, 1938.
Crl. R. P. No. 469 of 1938.

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had the right to do what he did even if he did not in law had the right to do, he cannot be said to have had the necessary intention or knowledge that he was likely to cause wrongful loss or damage.

Where the complainant and the petitioner (accused) occupied adjoining houses, and there was undoubtedly a projection of poles and planks over the land of the accused from the complainant's portion, and there was no doubt that the projections were an invasion of the rights of the accused, and he tried to remove them and in doing so caused damage to the complainant's building,

Held, that in a case of this type where the law itself is so uncertain the petitioner must have acted *bona fide* in the exercise of what he considered to be his rights, and certainly there was no justification for convicting him of a criminal offence in respect of his act.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Chief Presidency Magistrate of the Court of the Presidency Magistrate, Egmore, Madras, in C. C. No. 1304 of 1937.

N. Panchanatha Aiyar for Petitioner.

K. V. Ramaseshan for the Crown.

T.S. Muthuswamy for Respondent.

The Court made the following

ORDER.—This is a petition to revise the conviction of the petitioner by the Chief Presidency Magistrate, Madras, of an offence punishable under S. 426, Indian Penal Code.

The facts of the case are very simple. The complainant in the case and the petitioner who was the accused occupy neighbouring houses which were apparently built recently one after the other, the accused's house having been completed earlier than the complainant's. The complainant appears to have arranged to plaster the parapet wall on the terrace of his house by erecting a scaffolding supported by poles inserted in his terrace but projecting several feet over the accused's land and put planks on the poles which projected over the accused's land to the extent of about 3 or 4 feet. The accused appears to have objected to this projection of the scaffolding over his land and asked that it should be removed, and when his request was disregarded, he is said to have cut the ropes of the scaffolding and thrown down the cement which was upon it. The accused's defence was that he merely untied a portion of the scaffolding which he was entitled to do. Even assuming that the prosecution case is true that the ropes were cut and not merely untied

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and that cement was thrown out by the accused, the question remains whether what the accused did amounts to the offence of mischief. It is clear from the definition of the offence of mischief in S. 425, Indian Penal Code, that an essential ingredient of the offence is the intention to cause, or knowledge that the person is likely to cause, wrongful loss or damage. In other words, what is compendiously referred to as *mens rea* is one of the essential ingredients of this offence, and if the accused honestly believed in good faith that he had the right to do what he did, even if he did not in law have that right, he cannot be said to have had the necessary intention or knowledge that he was likely to cause wrongful loss or damage. In fact it has been laid down in a number of cases that, in the absence of any intention or knowledge of this kind a conviction for mischief cannot be had. In this case there was undoubtedly a projection of the poles and the planks over the land of the accused, and there can be no doubt that this projection was an invasion of the rights of the accused. He appears to have filed, while the criminal case was pending, a civil suit with reference to this matter, and it would appear that the Magistrate adjourned this case for a fairly long period in order to wait if possible for the civil suit to be determined. Finally he decided not to wait and pronounced judgment convicting the accused. Whether a projection of this kind amounts to a trespass which the owner of the property trespassed upon can remove in an ordinary or normal manner (and if it is a trespass the petitioner can take the law into his own hands without being found guilty of any criminal offence or even of a civil wrong) or whether it is a nuisance which he would have no right to abate himself by wrongfully dealing with another man's property is a question which cannot be easily determined. The learned advocate for the petitioner has referred to a passage at page 215 of Salmond on the Law of Torts, 8th edition, to the effect that a person may cut and remove telegraph or other electric wire stretched through the air above his land, at whatever height it may be, and whether he can show that he suffers any harm or inconvenience from it or not. This passage is based on the decision in *Wandsworth Board of Works* v. *United Telephone Co.*[1] In dealing with the same class of cases of trespass above the surface on the next page the learned author observes that the

1. (1884) 13 Q.B.D. 904 at 927.

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state of the authorities is such that it is impossible to say with any confidence what the law on this point really is; and in the foot note to that page he refers to a number of cases in some of which projections were held to amount to trespass, while in some others projections were held to amount only to nuisance and not trespass. It is clear therefore that in a case of this kind where the law itself is so uncertain the petitioner must have honestly believed that the projection was a trespass and that therefore he had a right to remove it by reasonable means. It is not alleged that the means were not reasonable, and there can be no doubt in these circumstances that he must have acted *bona fide* in the exercise of what he believed to be his rights and there was certainly no justification for convicting him of a criminal offence in respect of this act. It is unfortunate that the learned Magistrate should not have perceived this aspect of the case and should have exposed the petitioner to a comparatively prolonged trial in a case of this kind, subjecting him to a good deal of worry and expense. In my opinion this is a case which ought to have been dismissed ***in limine*** under S. 203, Criminal Procedure Code; indeed, compensation might have been awarded rightly in this case to the accused.

The conviction and the sentence of the petitioner are therefore set aside and the petitioner is honourably acquitted on the ground that no offence h s been made out at all even according to the case for the prosecution. The fine if paid must be refunded to the petitioner.

K.C. ——— *Conviction set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO.

Narayanaswami Nayak and another .. *Appellants** *(Plaintiff and Supplemental Appellant)*

v.

Ramaswami Nayak, son of Narayanappa Nayak and others .. *Respondents (Defendants 6 to 9 and 1 to 5).*

Narayanaswami Nayak v. Ramaswami Nayak.

Transfer of Property Act (IV of 1882), S. 83—Deposit by mortgagor under—Mortgagee's refusal to receive amount—Withdrawal—Subsequent payment to mortgagee's successor-in-title—Suit by him for balance of mortgage money as the amount paid on deposit was not sufficient in view of

* S. A. No. 1157 of 1934. 12th December, 1938.

interest accruing—Whether deposit valid—Circumstances regarding valid deposit—Consideration for deciding whether the creditor had discharged the burden of proof cast on him

In 1919 the first defendant executed a mortgage in favour of plaintiff's predecessor-in-title for some amount. The deed of mortgage provided 'To this sum . . . . I shall add interest at the rate of Re. 0-14-0 per cent. per mensem . . . . . In default of the amount of principal and interest accruing due till then, interest shall for the remaining periods be added at the rate of Re. 1-6-0 per cent. per mensem, etc.' Subsequently the first defendant sold the property to the wife of the fifth defendant who sold some items of which to one *S*, who in 1923 deposited under S. 83 of the Transfer of Property Act the amount due and payable under the mortgage up to the date of deposit. On notice to the mortgagee, the mortgagee declined to receive the amount. The amount remained in deposit for one year and was withdrawn by *S*. The plaintiff who succeeded the mortgagee on his death in 1926 received in 1927 the amount and released the items sold, to some of the defendants. But he instituted the present suit to recover a certain amount being the balance alleged to be still due and payable under the mortgage. The main defence was that the mortgage itself should be deemed to have been discharged by the deposit into Court and by the subsequent receipt of the amount by the plaintiff.

Held, that payment of the amount calculated at 14 annas per cent. compound interest less six pies being a reasonable compensation which any Court would accept, the amount deposited was the amount remaining due on the suit mortgage on the date of the deposit. The mortgagee always acts on peril in declining to receive the amount. Therefore it should be considered that *S* deposited the whole amount which was due under the mortgage up to date of deposit within the meaning of S. 83 of Transfer of Property Act.

Subramania Aiyar v. *Narayanaswami Vandayar*, (1917) 34 M.L.J. 439, relied on.

Ayyakutti Markondan v. *Periyasami Kavundan*, (1915) I.L.R. 39 Mad. 579 at 581, referred to.

On the question whether interest would not cease to run because of the withdrawal,

Held, that since the only question that would arise under the circumstances would be whether the mortgagor or the person depositing, notwithstanding his withdrawal, remained ready and willing to pay throughout, the burden was cast upon the creditor to show that the mortgagor was not willing or not able to pay because of his having spent the money; that burden not having been discharged by the plaintiff, his suit would fail on that point also.

Ramabhadra Thevar v. *Arunachella Pillai* (1926) 50 M.L.J. 468: I. L. R. 49 Mad. 609 (F.B.), referred to.

Appeal against the decree of the Court of the Subordinate Judge of Tuticorin in A.S. No. 84 of 1933, preferred against the decree of the Court of the District Munsif of Koilpatti in O.S. No. 104 of 1932.

C. S. Rajappa for Appellants.

R. Krishnaswami Aiyangar for Respondents.

The Court delivered the following

Narayanaswami Nayak v. Ramaswami Nayak.

JUDGMENT.—This second appeal raises a question as to the validity of a deposit under S. 83 of the Transfer of Property Act before it was amended by Act XX of 1929 and Act V of 1930. On 13th April, 1919, the first defendant executed a mortgage in favour of one Sankaranarayanaswami Nayak the plaintiff's predecessor-in-title for a sum of Rs. 1,350. The mortgage deed provided thus:

"To this sum of Rs. 1,350, I shall add interest at the rate of Re. 0-14-0 per cent. per mensem and pay the amount of principal and interest due thus on 11th April, 1920 and duly redeem this bond. In default, to the amount of principal and interest accruing due till then, interest shall for the remaining periods, be added at the rate of Re. 1-6-0 per cent. per mensem, and re the total of principal and interest, the interest accruing so due once in twelve months shall be added on to the principal, and you shall, whenever required, recover the amounts thus accruing due, along with interest at the said rate of Re. 1-6-0. . . . ."

Subsequent to the date of the mortgage the first defendant sold in the same year the said property which comprised eight items to his wife the fifth defendant. On the 12th July, 1920, the fifth defendant sold five items of property to one Sanniasa Pillai for Rs. 3,000. Part of the consideration was to go in discharge of the mortgage. On 15th September, 1921, the fifth defendant mortgaged the remaining three items to the sixth defendant whose sons are defendants 7, 8 and 9. On 27th November, 1923, Sanniasa Pillai deposited a sum of Rs. 2,144-12-4 in O.P. No. 51 of 1923, a petition under S. 83 of the Transfer of Property Act, as the amount due and payable under the mortgage up to the date of deposit. Necessary notice was given to the mortgagee but though he did not file any counter alleging what the amount due to him was, he declined to receive the money. The amount remained in deposit for a period of one year and thereafter was withdrawn by Sanniasa Pillai from Court. The mortgagee died in 1926 and the plaintiff succeeded to his property as his heir. On the 9th November, 1927, the plaintiff received Rs. 2,200 from Sanniasa Pillai and released the items sold to him. The plaintiff has instituted the present suit to recover a sum of Rs. 800 being the balance alleged to be still due and payable to him under the mortgage. The contesting defendants are defendants 6 to 9. Their main defence was that the mortgage itself must be deemed to have been discharged by the deposit into Court and by the subsequent receipt of the amount from Sanniasa Pillai. It is conceded that if the deposit in the said O. P. No. 51 of 1923 is held to be

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valid further interest would cease to run from the date of deposit and the plaintiff would not be entitled to any relief. The learned District Munsif found that the correct amount that should have been deposited was less by six pies, that is, the amount that should have been deposited was Rs. 2,144-12-10 instead of Rs. 2,144-12-4. Following the ruling in *Subbai Goundan* v. *Palani Goundan*[1], he held that as the amount deposited fell short of the amount actually due, there was no valid deposit within the meaning of the section. He therefore gave a decree to the plaintiff as prayed for. The learned Subordinate Judge, while reversing this decision, took the view that the amount deposited was the correct amount. His ground for coming to that conclusion is this: Sanniasa Pillai made an application O. P. No. 51 of 1923 with the lodgment schedule on 23rd November, 1923 and applied for a chalan on the same day for the payment of money to be deposited into the treasury but the Court took four days to issue the necessary chalan and the amount was deposited on the very day on which the chalan was issued; the delay was therefore due to the Court and no litigant should suffer by the default of the Court; in the circumstances the application for chalan was equivalent to deposit and the amount deposited was the correct amount due on the date of the O. P. There was also another plea raised before the learned Judge, namely, that as Sanniasa Pillai withdrew the amount from Court, interest would not cease to run, but this plea was overruled by the learned Judge. Hence the plaintiff has preferred this second appeal.

It was contended on his behalf by his learned Counsel that the amount of the insufficiency is an irrelevant consideration in construing S. 83 of the Transfer of Property Act and once it is found that the amount deposited was not the entire amount that was due, interest would not cease to run. The learned Counsel strongly relied on *Subbai Goundan* v. *Palani Goundan*[1], where the deficiency was 9½ pies. I may at once state that the correctness of this decision was doubted by Seshagiri Aiyar, J., in *Subramania Aiyar* v. *Narayanaswami Vandayar*[2], where the learned Judge remarks thus:

"If I were deciding that case I would have applied the maxim *de minimus non curat lex*."

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1. (1916) 30 M.L.J. 607. 2. (1917) 34 M.L.J. 439.

Narayana-swami Nayak v. Ramaswami Nayak.

I respectfully agree with his view. As pointed out by Broom in his legal maxims:

"The Court is not bound to a strictness at once harsh and pedantic in the application of statutes. The law permits the qualification implied in the ancient maxim *de minimus non curat lex.*"

But sitting as a single Judge that decision is binding on me but it is not applicable to the facts of this case. Whether a deposit is valid or not would depend upon the fact whether the amount deposited was the amount remaining due on the mortgage on the date of the deposit within the meaning of S. 83 of the Transfer of Property Act. This would again depend on the terms of each deed of mortgage. The question therefore is what was the amount remaining due on the suit mortgage on 27th November, 1923? It is conceded that the provision of enhanced interest at Re. 1-6-0 per cent. per month is penal and the mortgagee would not be entitled to enforce that provision if he were to sue on the mortgage. He is entitled to claim only a reasonable compensation in lieu of the said interest. What the reasonable compensation is depends on the circumstances of each case. As pointed out by Kumaraswami Sastri, J., in *Ayyakutti Markondan* v. *Periyasami Kavundan*[1], in such cases as this the amount legally due would be what the Court finds it to be. In this case the amount deposited was calculated according to 14 annas per cent. per month compound interest and according to that calculation the amount was paid. No doubt the amount paid was less by six pies; but it is always open to the Court to accept the amount paid as reasonable compensation. Therefore the payment of the amount calculated at 14 annas per cent. compound interest less six pies being a reasonable compensation which any Court would accept, the amount deposited was the amount remaining due on the suit mortgage on the date of the deposit. The mortgagee always acts in peril in such cases in declining to receive the said amount. I would therefore hold that what Sanniasa Pillai deposited was the whole amount which was due under the mortgage on the date of the deposit within the meaning of the section. In this view it is unnecessary to consider the contention based on the delay of the Court in issuing the chalan.

The next point urged is that as the amount was withdrawn the provisions of S. 83 of the Transfer of Property Act cannot

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1. (1915) I.L.R. 39 Mad. 579 at 581.

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be availed of and interest would not cease to run. The learned Counsel relied on the amended provision of the Transfer of Property Act but this case is governed by the Act before the amendment in 1929 and 1930—*vide* the observations of Venkatasubba Rao, J., in *Suppan Chettiar* v. *Rangan Chetty*[1]. Before the amendment a Full Bench of the Madras High Court in *Ramabhadra Thevar* v. *Arunachella Pillai*[2] held that from the mere fact of withdrawal *per se* it cannot be said that interest would not cease to run. It was pointed out in that case that the deposit operated as a tender and

> "the only question properly arising was whether the mortgagor notwithstanding his withdrawal remained ready and willing to pay throughout...... The burden is cast upon the creditor to show that he was either not willing or not able to pay because he had utilised the moneys for other purposes."

This burden has not been discharged by the plaintiff. The fact that Sanniasa Pillai paid Rs. 2,200 in 1927 when demanded shows that he was always ready and willing to pay throughout.

In the result the second appeal fails and is dismissed but without costs.

Leave to appeal refused.

K. C. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MADHAVAN NAIR AND MR. JUSTICE STODART.

Rentala Ganga Raju .. *Petitioner* in both (1st Appellant in Appeal No. 173 of 1926 on the file of the High Court—Petitioner)*

v.

Bikkina Bulli Ramayya and others .. *Respondents in both (Respondents Nos. 2, 4 and 5 in Appeal No. 173 of 1926 on the file of the High Court—Respondents).*

Rentala Ganga Raju v. Bikkina Bulli Ramayya.

Madras Agriculturists' Debt Relief Act (IV of 1938), Ss. 19 and 20—Petition to Court of first instance to scale down debt and amend decree—Decree of appellate Court—Proper Court, which is—Jurisdiction.

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1. A.I.R. 1938 Mad. 405 at 412.
2. (1926) 50 M.L.J. 468: I.L.R. 49 Mad. 609 (F.B.).

* C. M. P. No. 5016 of 1938 and C. R. P. No. 26 of 1939. 12th January, 1939.

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Ss. 19 and 20 of the Madras Agriculturists' Debt Relief Act should be read together and the explanation of the expression 'Court which passed the decree' in S. 20 equally applies to S. 19.

Where a decree-holder sought to execute a mortgage decree confirmed by the appellate Court, but the petitioner applied in the Court of first instance under S. 19 of the Madras Agriculturists' Debt Relief Act to scale down the decree debt and amend the decree accordingly and that Court held that it had no jurisdiction to deal with the application and returned the petition for presentation to the proper Court,

Held, that the petitioner's application to scale down the decree-debt and amend the decree was properly made to the Court of first instance and that Court had jurisdiction to deal with it.

C. M. P. No. 5016 of 1938.

Petition under S. 19 of the Madras Act IV of 1938, praying in the circumstances stated therein, the High Court will be pleased to scale down the debt due under decree in Appeal No. 173 of 1926 on the file of the High Court (O. S. No. 60 of 1923 on the file of the Court of the Subordinate Judge of Rajahmundry) according to S. 8 (1) of the said Act.

C. R. P. No. 26 of 1939.

Petition under S. 115 of Act V of 1908, praying the High Court to revise the order of the Court of the Subordinate Judge of Rajahmundry dated 5th October, 1938 and made in I. A. No. 224 of 1938 in Original Suit No. 60 of 1923.

P. V. Vallabhacharyulu for Petitioner.

A. Satyanarayana for Respondents.

The judgment of the Court was delivered by

Madhavan Nair, J.

Madhavan Nair, J.—The thirty-ninth defendant in O. S. No. 60 of 1923 on the file of the Subordinate Judge of Rajahmundry is the petitioner before us. In that case a mortgage-decree was passed against the petitioner and others and that decree was appealed against to this Court. The appeal was dismissed on 13th February, 1936.

When the decree-holder sought to execute the decree, the proceedings were got stayed by the petitioner on 29th September, 1938, by an application under S. 20 of Madras Act IV of 1938 (the Madras Agriculturists' Debt Relief Act); and on 14th April, 1938, he filed an application under S. 19 of the said Act praying to scale down the decree-debt and amend the decree accordingly. This application was filed to the lower Court within the period mentioned in S. 20 of the Act. But that Court held that it had no jurisdiction to deal with the application and returned the petition for presentation to the proper Court.

Rentala Ganga Raju v. Bikkina Bulli Ramayya.

Madhavan Nair, J.

The petition has therefore been presented to this Court, and a Civil Revision Petition has also been filed by the petitioner to revise the order of the lower Court. S. 20 says that the application for relief under S. 19 should be made " to the Court which passed the decree" within sixty days after the application for stay has been granted. That period has now elapsed and the respondent, the decree-holder, takes the objection that the petition under S. 19 presented to this Court is barred by time. If the lower Court has jurisdiction to entertain the application under S. 19, then the question of limitation does not arise because the application before it was presented in time. The question therefore for our consideration is whether the lower Court had jurisdiction to entertain this application under S. 19 of the Madras Agriculturists' Debt Relief Act.

The lower Court arrived at the conclusion that it had no jurisdiction on the following reasoning. It stated: "If really the Legislature thought that the application under S. 19 should be made to the Court of first instance only, it would have expressly said so under S. 19 by way of explanation as it did under S. 20 of the Act. That suggests that the Legislature did not contemplate any change in the general principle so far as S. 19 is concerned" the general principle being, as is stated in the earlier part of the judgment, that "after the lower Court's decree had been confirmed or modified by the appellate Court the jurisdiction of the lower Court to amend the decree ceases." We cannot accept this reasoning. It is true that S. 19 of the Act does not explain the expression "Court which passed the decree". S. 20 of the Act says in its explanation that "the Court which passed the decree" shall have the same meaning as in the Code of Civil Procedure, 1908. S. 37, Civil Procedure Code, says:

> "The expression 'Court which passed a decree', or words to that effect, shall, in relation to the execution of decrees, unless there is anything repugnant in the subject or context, be deemed to include, (a) where the decree to be executed has been passed in the exercise of appellate jurisdiction, the Court of first instance."

In the present case the reference to the "Court which passed the decree" in S. 20 of the Madras Agriculturists' Debt Relief Act is, by its explanation, to the Court of first instance, that is, the Court to which the petitioner made his application. A perusal of the two Ss. 19 and 20 shows clearly that they

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have to be read together. S. 19 says:

"Where, before the commencement of this Act, a Court has passed a decree for the repayment of a debt, it shall . . . . . . amend the decree."

Under this section, application has to be made to the Court which has passed the decree and it has jurisdiction to amend the decree in a proper case. No doubt it does not use the exact expression "Court which passed the decree," but it says that where a Court has passed a decree it will have jurisdiction to amend it. S. 20 makes it clear that the Court contemplated in S. 19 is the Court which passed the decree for it says that the executing Court shall, on application, stay the proceedings "until the Court which passed the decree has passed orders on an application made under S. 19"; and which that Court is, is explained in that section to mean the Court of first instance. We have no doubt that Ss. 19 and 20 of the Madras Agriculturists' Debt Relief Act should be read together and the explanation of the expression 'Court which passed the decree' in S. 20 equally applies to S. 19. The petitioner's application to scale down the decree-debt and amend the decree was in our opinion properly made to the Court of first instance and that Court had jurisdiction to deal with that application. We therefore set aside the order of the lower Court and remand the application to it for disposal according to law after considering the merits. Though the respondent did not seriously contest the application, we think the petitioner is entitled to the costs of the Civil Revision Petition in this Court. The other costs will be provided for in the order of the lower Court.

Revision Petition allowed and application remanded.

K. C.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW.

K. S. Ambi Aiyar .. *Petitioner* (Accused).*

Ambi Aiyar, *In re.*

Madras Prevention of Adulteration Act (III of 1918), S. 5 (1) (d)—Applicability—Selling of sweetmeats containing fat—Government not prescribing any standard for same—Offence if constituted.

A person cannot be convicted for a breach of the Madras Prevention of Adulteration Act when there is no law or rule having the force of law prescribing a particular composition for the article that is exposed for sale.

Held, that as the Government had not laid down any standard in respect of sweetmeats like 'kajoor', the selling of such sweetmeats which do not

* Crl. R. C. No. 671 of 1938 and Crl. R. P. No. 639 of 1938. 5th January, 1939.

contain what they are usually expected to contain does not amount to an offence under S. 5 (1) (*d*) of the Madras Prevention of Adulteration Act. Ambi Aiyar, *In re.*

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Sub-Divisional Magistrate of Vellore in Criminal Appeal No. 12 of 1938 preferred against the judgment of the Court of the Second Class Magistrate of Vellore in C. C. No. 242 of 1938.

V. Rajagopala Mudaliar for Petitioner.

K. Venkataraghavachari for *The Public Prosecutor* (*V. L. Ethiraj*) for the Crown.

The Court made the following

ORDER.—The petitioner has been convicted of an offence punishable under S. 5, cl. 1 (*d*) of the Madras Prevention of Adulteration Act III of 1918 and sentenced to pay a fine of Rs. 100. The petitioner is the proprietor of a Coffee Hotel at Vellore and the prosecution relates to a certain sweetmeat called 'kajoor' which was prepared and sold at the hotel by the petitioner through his servants. The sample that was analysed was found to contain 80 per cent. of fat not derived from milk or cream. The prosecution assumed and the Magistrate seems to have acted on the same assumption that merely because the sweetmeat was found to contain 80 per cent. of fat not derived from milk or cream it amounts to adulteration which is prohibited by the Act. The particular sweetmeat in question is not one of the articles of food in respect of which the Government have prescribed standards of purity or determined the normal constituents thereof, and it cannot be said that there is any room afforded for raising a presumption that the article of food is not genuine or is injurious. It is conceded by the learned Public Prosecutor that no such action has been taken by the Local Government in respect of this particular article of food known as 'kajoor', and it is not right therefore to convict a man for a breach of the adulteration law when there is no law or rule having the force of law prescribing a particular composition for the article that is exposed for sale. It may be that ghee is one of the ordinary ingredients of the sweetmeat in question but the standard of purity which is laid down in the case of ghee cannot be applied to the ghee that is contained in the sweetmeat as one of its ingredients, so long as there is no separate standard of composition or quality fixed for the

Ambi Aiyar, *In re.*

sweetmeat, for instance, prescribing that it should contain so much percentage of ghee; on this ground alone it is clear that the conviction of the petitioner cannot stand. The Government not having laid down any standard in respect of sweetmeats like 'kajoor' the selling of the sweetmeats which do not contain what they are usually expected to contain does not amount to an offence under S. 5, cl. 1 (*d*) of the Act. The conviction of the petitioner and the sentence imposed upon him are therefore set aside and he is acquitted and the fine if paid should be refunded to him.

B. V. V. —— *Petition allowed.*

THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MOCKETT.

S. S. S. Varisai Muhammad Rowther .. *Petitioner* (Petitioner-Plaintiff)*

v.

Marungapuri Estate in charge of the Court of Wards represented by the Manager of the Estate under the Court of Wards (amended as per order of Court dated 26th August, 1938) and another .. *Respondents (Respondents-Defendants).*

Varisai Muhammad Rowther v. Marungapuri Estate.

Madras Estates Land Act (I of 1908), S. 185—Private land in Zamindari—Burden of proof—Onus wrongly cast—Issue framed—Interference in revision—Civil Procedure Code (V of 1908), S. 115.

S. 185 of the Madras Estates Land Act provides that when in any suit it becomes necessary to determine whether any land is the landholder's private land the land shall be presumed not to be private until the contrary is shown. If a tenant shows that his rights have been interfered with on the ground that it is not private land the burden is on the Zamindar to show that it is not private land.

Veerabhadrayya v. *Sree Rajah Bommadevara Naganna Nayudu,* (1926) 52 M.L.J. 38: I.L.R. 50 Mad. 201, relied on.

When a statute specifically puts the burden of proof upon a certain party, the Court in putting the burden of proof the other way is acting with material irregularity in the exercise of jurisdiction and the High Court may in a proper case interfere in revision to set right an issue framed in such a manner as to disregard the statutory provision regarding burden of proof.

Rajagopala Aiyangar v. *Ramanuja Aiyangar,* A I.R. 1923 Mad. 607 and *Sri Tripura Sundari Cotton Press Co., Ltd., Beswada* v. *Venkata Gurunadha Ramaseshayya,* (1935) 69 M L J. 239, referred to.

* C.R.P. No. 779 of 1938. 26th August, 1938.

Varisai Muhammad Rowther v. Marungapuri Estate.

Petition under S. 115 of Act V of 1908, praying the High Court to revise the order of the Court of the District Munsiff of Kulitalai dated 4th June, 1938 and made in Interlocutory Application No. 312 of 1938 in O. S. No. 673 of 1937.

S. Ramaswamy Aiyar for Petitioner.

K. Kuttikrishna Menon for Respondents.

The Court delivered the following

JUDGMENT.—The plaintiff who holds under a lease from the Zamindar of Marungapuri sued for possession of a certain land which the defendants had taken from him. He alleged that the land was zamin private land and not pannai land. The defendants pleaded that the plaintiff had taken a lease of the said land as pannai land. At the settlement of issues the District Munsiff dealing with the burden of proof said:—

"The plaintiff having taken the lease of the suit lands as pannai lands, I think the burden of proving that they are ryoti lands is on him. The issue will therefore be amended as follows: 'Whether the lands are ryoti lands'?"

A Civil Revision Petition has been filed against that order. Two questions arise (1) Whether that order is wrong and (2) if wrong, whether I should interfere under S. 115. Under S. 185 of the Madras Estates Land Act, when in any suit or proceeding it becomes necessary to determine whether any land is the landholder's private land, regard shall be had to local custom and to the question whether the land was before the 1st day of July, 1898, specifically let as private land and to any other evidence that may be produced, but the land shall be presumed not to be private land until the contrary is shown. It has been argued that, as the Zamindar is not the plaintiff, in the circumstances of this case the burden is upon the plaintiff to prove that the land is private land. I do not think that the Act ever intended that there should be a nice distinction in this matter. S. 185 is quite clear that when in any suit it becomes necessary to determine whether any land is the landholder's private land the land shall be presumed not to be private until the contrary is shown. I think if a tenant shows that his rights have been interfered with on the ground that it is not private land the burden is on the Zamindar to show that it is not a private land. That seems to be the whole idea underlying S. 185. Otherwise it will be only too easy to get a tenant to

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take a lease describing the land as pannai land and say that he is thereafter bound to prove what he probably cannot prove at all. Were these matters in the High Court where elaborate provisions with regard to discovery are available the position might be easier. In the lower Courts the ryot is probably being asked to shoulder a burden which it is quite impossible for him to bear. I consider that the decision of the Bench in *Veerabhadrayya* v. *Sree Rajah Bommadevara Naganna Nayudu*[1] (Krishnan and Venkatasubba Rao, JJ.) supports the view that I take. The learned Judges there held that a landholder cannot rely upon leases subsequent to 1st July, 1898, to make out that a plot of land is private land although they can be used for ancillary purposes. In this case the lease is long after 1898, but the burden of proof has been put on the ryot. I take the view that when the statute specifically puts the burden of proof upon a certain party, the Court in putting the burden of proof the other way is acting with material irregularity in the exercise of its jurisdiction. I indicated in *Sri Tripura Sundari Cotton Press Co., Ltd., Bezwada* v. *Venkata Gurunadha Ramaseshayya*[2], that interference in revision in matters relating to issues is very sparingly made. I perhaps did not make it sufficiently plain in that case that I interfered there because I considered that that was a clear case of exercise of jurisdiction with material irregularity. It seems to me that there may be such cases. Supposing for instance in an action for libel, where the defendant justifies and the burden of proof is put on the plaintiff or in an action for negligence where the issue is, "were the injuries to the plaintiff not caused by the negligence of the defendant" and sometimes in an action on a promissory note the issue is "was there no consideration for the promissory note" it seems to me that to allow the case to proceed on these lines is wholly to disregard vital recognized procedure. It might even result in the defendants or the plaintiffs in the particular case being unable to proceed at all, because they were being denied the right which the law gave them as regards the burden of proof. I can imagine nothing more remarkable than in an ordinary case of motor accident for the defendant to be compelled to begin and to go first into the witness-box. It could follow that the

1. (1926) 52 M.L.J. 38: I.L.R. 50 Mad. 201.
2. (1935) 69 M.L.J. 239.

plaintiff could submit that he had no case to answer. I make these observations because it is only in such cases where I consider that the whole trial is vitiated from the very beginning that, speaking for myself, I should interfere so that there should not be a complete waste of time by a trial taking place under circumstances directly contrary to law. In a vast number of cases the burden of proof is of very little importance once the evidence is before the Court. In some cases it is of the utmost importance and I consider this is one of them. It is quite possible if this suit had gone on in this form the plaintiff would have been unable to make any progress at all. I accordingly think this is a case for interference. I do not consider that this decision is in any way in conflict with the view laid down by a Full Bench of this Court in *Kristamma Naidu* v. *Chapa Naidu*[1], because I consider that to disregard the direction of the statute with regard to burden of proof, not in the least being a discretionary matter, is a perverse decision and conscious departure from the rule of procedure. It is supported by a decision of a Bench in *Rajagopala Aiyangar* v. *Ramanuja Aiyangar*[2]. I allow this petition.

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The result is that the second issue will read "whether the lands are not ryoti lands". The petitioner is entitled to his costs of this petition.

B.V.V. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Papathi Ammal (deceased) and others .. *Appellants** (*Plaintiff and her legal representatives*)

v.

Doraiswamy Naicker and others .. *Respondents* (*Defendants*).

Transfer of Property Act (IV of 1882), Ss. 122 and 123—Gift—Deed executed and duly registered—Donor's right to revoke before acceptance by donee.

Papathi Ammal v. Doraiswamy Naicker.

A gift of immovable property which has not been accepted by the donee is incomplete, though the deed of gift has been executed and duly registered by the donor; the donor is entitled to revoke the gift prior to its acceptance by the donee. Registration will not confer upon any invalid transfer a validity which is lacking in the very substance of the transaction.

1. (1894) I.L.R. 17 Mad. 410 (F.B.). 2. A.I.R. 1923 Mad. 607.

* S.A. No. 266 of 1934. 7th October, 1938.

Papathi Ammal v. Doraiswamy Naicker.

Appeal against the decree of the Court of the Subordinate Judge of Chingleput in A.S. No. 20 of 1932 (A.S. No. 159 of 1931, District Court, Chingleput), preferred against the decree of the Court of the District Munsiff of Madurantakam at Chingleput in O.S. No. 301 of 1930 (O.S. No. 20 of 1930, District Munsiff's Court, Conjeevaram).

B. Sitarama Rao and *P. Muthukumaraswami Mudaliar* for Appellants.

K. S. Champakesa Aiyangar for Respondents.

The Court delivered the following

JUDGMENT.—This appeal raises a question of the right of a donor to revoke a registered deed of gift of immovable property prior to its acceptance. The donor is the first defendant. He executed the deed Ex. A dated 14th March, 1917, giving his properties to his mother and his wife and her issue, if any, with a remainder to a nephew under whom the plaintiff claims. It has been found as a fact that, although this deed was registered, there was no change of possession and no delivery of the deed to the donees, nor was there any acceptance by them. By S. 122 of the Transfer of Property Act, a gift is made by a voluntary transfer from the donor to the donee, accepted by or on behalf of the donee. The acceptance must be during the lifetime of the donor and if the donee dies before acceptance the gift is void. Under S. 123, if the gift relates to immovable property, it must be made by a registered instrument, duly signed and attested. In England it is undoubtedly the law that a gift is presumed to have been accepted by the donee even if the donee knows nothing about it. But I have no doubt that presumption does not apply in India. As has been pointed out by the Allahabad High Court in the case of *Anandi Devi* v. *Mohan Lal*[1], such a presumption as is recognised in England would be inconsistent with the provision of S. 122 of the Transfer of Property Act that the gift is void if the donee dies before acceptance. We may take it therefore that the present gift, though the deed was executed and registered by the donor, was an incomplete gift at the time of its cancellation in 1922 because it had not been accepted. It is contended by Mr. Sitarama Rao for the appellant that even though the gift is not complete until its acceptance, the registration of the gift deed takes away the power of revocation from the donor. The

1. (1932) I.L.R. 54 All. 534.

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argument, as I understand it, is that he having duly executed the deed and having solemnly registered it, he has done all that he ought to do to validate the gift and cannot take advantage of the non-acceptance of the gift by the donee in order to nullify his own act. This contention appears to be built up mainly on one sentence in the decision in *Padmavati* v. *Shrinivasa Kamptii*[1], where apparently referring to the Full Bench decision in *Venkati Rama Reddi* v. *Pillati Rama Reddi*[2] (though the report wrongly refers to the decision in *Gangadara* v. *Sambasiva*[3], which refers to another matter). Abdur Rahim, J., says that

> "The Full Bench decision referred to certainly does not go so far. All that it lays down is that if the donor has done all that lies in his power to complete the gift either by having it registered himself or by handing it to the donee, then he cannot afterwards retract the gift."

With great respect to the learned Judge if I am correct in my inference that his observation really relates to the former case it seems to me that he has somewhat overstated the effect of the Full Bench decision to which he referred. I must remark that the learned Judge himself was a party to that Full Bench decision and may possibly be speaking with a recollection of things said in the course of the hearing which are not embodied in the judgment. But the judgment itself relates to a case in which the donor completed the deed of gift and after his death the donee got it registered. What the learned Judges point out is that in such a case the doctrine that a donor who has left his gift incomplete, cannot be compelled to complete it, has no application. So far as he is concerned, he has by executing the deed done all that he need do, for registration can be effected even without his co-operation. This decision has been considered by the Privy Council in *Kalyanasundaram Pillai* v. *Karuppa Moopanar*[4], and their Lordships approve the statement of law subject to the proviso that the gift must have been accepted by or on behalf of the donee during the life time of the donor in order to satisfy the requirements of S. 122. It seems to me apparent that registration cannot convert that which is not a complete transfer into a complete transfer. No

1. (1917) 7 L.W. 339 at 350.
2. (1916) 31 M.L.J 690: I.L.R. 40 Mad. 204 (F.B.).
3. (1916) 33 M.L.J. 51: I.L.R. 40 Mad. 759 (F.B.).
4. (1926) 52 M.L.J. 346: L.R. 54 I.A. 89: I.L.R. 50 Mad. 193 (P.C.).

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one would even contend that if a mortgage deed has been invalidly executed, the mere fact of its registration would give it any validity which it had not got. Similarly, if a gift is complete except for the acceptance of the donee, I do not see how registration can make it anything more than an incomplete gift and if the gift is incomplete for want of acceptance by the donee, I know of no principle of law which would bar the donor from revoking it. Registration is a necessary formality for a gift of immovable property to have full force. But registration will not confer upon any invalid transfer a validity which is lacking in the very substance of the transaction. In the result I dismiss the appeal with costs of the contesting respondent.

Leave refused.

K. C. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING AND MR. JUSTICE STODART.

Tile Beharani and another .. *Appellants* (Respondents 2 and 3)*

v.

Kevute Raghubehara .. *Respondent (Petitioner).*

Tile Beharani v. Raghubehara.

Civil Procedure Code (V of 1908), S. 37—Constitution of Orissa Province—Execution of decree for first time—Jurisdiction of Court passing decree—Notifications under S. 20, Order in Council—Effect.

On 1st April, 1936, the Province of Orissa was constituted and the Court of the Subordinate Judge of Berhampore became from that date a Court within the jurisdiction of that province. After that date the respondent, who had obtained a decree against the predecessor-in-title of the appellants in the Court of the Subordinate Judge of Berhampore at a time when the Court was within the Presidency of Madras and whose decree had been confirmed by the High Court of Madras, filed an application to execute the decree in the Court at Chicacole which had newly assumed jurisdiction instead of in the Berhampore Court. It appeared that the Governor-General-in-Council in exercise of the powers under S. 20 of the Order in Council constituting the Province of Orissa had notified that every proceeding pending in a Court other than a High Court in any area transferred to Orissa should be continued as if the said order had not been made.

Held, that as the execution petition was not a "pending proceeding" the Berhampore Court ceased to have jurisdiction to entertain it, and that it should be presented to the Court at Chicacole within the Province of Orissa.

Ramier v. *Muthukrishna Aiyar*, (1932) 62 M.L.J. 687: I.L.R. 55 Mad. 801 (F.B.), considered.

* C. M. A. No. 12 of 1938. 16th August, 1938.

Appeal against the order of the Court of the Subordinate Judge of Chicacole dated 1st December, 1937, and made in E. P. No. 26 of 1936 in O. S. No. 27 of 1936 (Sub-Court, Berhampore).

C. Sambasiva Rao and *S. Ramamoorthy* for Appellants.

B. Jagannadha Das for Respondent.

The Court delivered the following

JUDGMENT.—On 1st April, 1936, the province of Orissa was constituted, and the Court of the Subordinate Judge of Berhampore has on and from that date, been a Court within the jurisdiction of that province. After that date the respondent who had obtained a decree against the predecessor-in title of the appellants in the Court of the Subordinate Judge of Berhampore at a time when the Court was within the Presidency of Madras and whose decree had been confirmed by the High Court of Madras filed an application to execute the decree, and filed it not in Berhampore but in the Court of the Subordinate Judge of Chicacole. The appellants contended that he ought to have filed his application in Berhampore, and as the learned Subordinate Judge has overruled their contention they have now appealed to this Court.

The law which has to be applied to these facts is found in S. 37 of the Civil Procedure Code. It is clear to us from a study of that section that

(*i*) only one of the two Courts (Berhampore or Chicacole) is the proper Court to which application to execute must be made.

(*ii*) that application must be made to Berhampore, the Court of first instance.

Unless the Court of the Subordinate Judge of Berhampore has either (*a*) ceased to exist or (*b*) ceased to have jurisdiction to execute the decree. The learned Subordinate Judge of Chicacole has held that the Berhampore Court has *both* ceased to exist and ceased to have such jurisdiction.

To decide whether this finding is right or wrong it will be necessary to consider the various notifications which were issued at the time of the constitution of the Orissa Province. Those notifications are the following:—

(*i*) By S. 20 of the Order in Council constituting the province (*see Fort St. George Gazette* for 31st March, 1936, at p. 389) the Governor-General-in-Council was given power to give such directions as he thinks proper as to the disposal of pending cases in all Courts other than the High Court and as to the Courts which should hear certain appeals and proceedings in revision;

(*ii*) the Governor-General-in-Council in the exercise of this power notified (*see* pages 464 and 465 of the same issue of the Gazette) that every

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proceeding pending in a Court, other than a High Court, in any area transferred by the said order to Orissa should be continued as if the said order had not been made; and

(*iii*) Regulation No. 1 of 1936 was published by the Government of India to declare the law in force in the Province of Orissa (*see* p. 460 of the same issue of the Gazette).

By S. 4 (2) of the Regulation all Courts constituted.... under the Madras Civil Courts Act, 1873....shall be deemed to have been constituted....under the Bengal, Agra and Assam Civil Courts Act, 1887. By applying these notifications to the Berhampore Court we arrive at the following conclusion—that all pending proceedings in that Court were to be continued—and that that Court was to be deemed, as far as may be, to have been constituted under the Bengal Civil Courts Act.

Now the first question which arises is "Has the Berhampore Court ceased to exist?" To us it seems impossible to hold that it has ever ceased to exist. It remains the same Court in the same buildings in the same town. Its functioning was never suspended for a single minute. It continued to deal with all pending proceedings, and any legal difficulties as to the source of its further jurisdiction from 1st April, 1936, onwards were met by the provision that it was to be deemed to have been constituted under the Bengal Act. The object of the notifications seems to us to have been to *prevent* the Berhampore Court from ceasing to exist and to ensure its continuity. We are unable therefore to agree with the learned Subordinate Judge that the Berhampore Court ceased to exist.

Has then the Berhampore Court lost its jurisdiction to execute such of its own decrees as were passed when it was a Court within the Presidency of Madras? We think a true reading of the notifications will show that it has—unless an execution application happened to be pending at the beginning of April, 1936.

S. 19 (1) (*b*) of the Order in Council shows that the jurisdiction of the High Court of Madras with respect let us say, to Berhampore Town shall cease, subject only to what is enacted in S. 19 (2). Then comes S. 20. What is the purpose of that section if it is not to provide for a similar ceasing of jurisdiction on the part of all subordinate Courts in the transferred areas? Further, when it is enacted that a Court actually constituted under a Madras Act shall be deemed as far as may be, to have been constituted under a Bengal Act, that

seems to us to carry with it the obvious implication that as and from 1st April, 1936, a Court in the position of the Berhampore Court ceases to have jurisdiction for any purpose over any matter arising within the Presidency of Madras except in so far as any other notification may give it such jurisdiction—and it is not seriously contended here that the present application can come within the meaning of the words 'pending proceeding'.

Appellants' learned Advocate relied very strongly however upon *Ramier* v. *Muthukrishna Aiyar*[1], as authority for the position that the mere loss of territorial jurisdiction does not take away from the Court which has once passed a decree its power to execute it; and it is a plausible argument to extend that proposition to cover the facts of the present case. An examination of that case, however, will show that one of the main reasons for the decision was that a notification of the Government altering the territorial jurisdiction of Courts will not affect pending cases unless special reference is made to them and cannot therefore amount to action under S. 150 of the Civil Procedure Code. In the present case special reference *is* made to pending cases, and a special notification published to preserve the jurisdiction of the Court to continue them. We accordingly do not think that *Ramier* v. *Muthukrishna Aiyar*[1], stands in our way and we hold that the existence of the specific notification is itself the strongest indication that but for it all jurisdiction in Berhampore would be gone in respect of such of those cases as arise from the area still retained in Madras.

Appellants' learned Advocate argues finally that a Court which passed a decree can never lose its jurisdiction to execute it unless some specific act of transfer deprives it of that jurisdiction. That argument is refuted by *Zamindar of Vallur and Gudur* v. *Adinarayudu*[2], where it was held that the Court of a District Munsiff which passed a decree when invested with special powers to try small cause suits up to a certain value had no jurisdiction to execute it after those powers had been withdrawn.

For these reasons we are of opinion that the order of the learned Subordinate Judge of Chicacole is right and we dismiss this appeal with costs.

B. V. V. —— *Appeal dismissed.*

1. (1932) 62 M.L.J. 687: I.L.R. 55 Mad. 801 (F.B.).
2. (1896) I.L.R. 19 Mad. 445.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO.

Krishnaswami Mudaliar .. *Appellant** (*Plaintiff*)

v.

Vijiaraghava Pillai and others .. *Respondents* (*Defendants 2, 3 and 1*).

Krishnaswami Mudaliar *v.* Vijiaraghava Pillai.

Transfer of Property Act (IV of 1882), S. 55 (4) (b)—Vendor's lien—Sale for money consideration—Promissory note taken for portion of sale price—Enforceability of statutory charge.

Under S. 55 (4) (*b*) of the Transfer of Property Act the charge subsists in every case where the amount of the purchase money remains unpaid either for the whole or for the part remaining unpaid. Where the consideration for the sale deed was a sum of money and for a portion of the consideration the vendee executed a promissory note in favour of the vendor,

Held, that in the absence of anything to show that the statutory charge had been abandoned the vendor could enforce the statutory charge for the amount covered by the promissory note and remaining unpaid.

Case-law discussed.

Appeal against the decree of the District Court of North Arcot at Vellore in A. S. No. 333 of 1932 preferred against the decree of the Court of the District Munsif of Arni in O. S. No. 428 of 1931.

A. Ramaswami Aiyar for Appellant.

T. Krishna Rao for *B. Sitarama Rao* for Respondents.

The Court delivered the following

JUDGMENT.—This is an appeal from the judgment of the learned District Judge of North Arcot dismissing the suit against defendants 2 and 3 in reversal of the decree of the District Munsif of Arni. On 22nd September, 1928, the plaintiff sold certain properties of his to the first defendant for a sum of Rs. 1,000. Rs. 500 was paid in cash and for the balance of Rs. 500 a promissory note was executed by the first defendant in favour of the plaintiff which carried interest at 1 per cent. per mensem. The first defendant committed default in the payment of the said money and this action has been brought for the recovery of Rs. 620 being the principal and interest due in respect of the said promissory note up to the date of the suit. The plaintiff also prayed for a sale of the said properties on the ground that he had a statutory charge for the payment of the said sum of money under S. 55 (4) (*b*) of the Transfer of

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* S. A. No. 670 of 1934. 29th September, 1938.

Krishna-swami Mudaliar *v.* Vijia-raghava Pillai.

Property Act. Defendants 2 and 3 have been impleaded as parties to the suit as they purchased the properties from the first defendant by sale deeds dated 17th November, 1930 and 11th August, 1930, respectively. The first defendant did not resist the plaintiff's claim but defendants 2 and 3 pleaded that they are *bona fide* purchasers without notice of the existence of any such charge and further that the plaintiff had also waived the charge by taking the promissory note above referred to. The learned District Munsif found that defendants 2 and 3 who are the sons-in-law of the first defendant were fully aware of the non-payment of the balance of the purchase money of Rs. 500, that the plaintiff by taking the promissory note for the said amount did not lose the charge given to him by statute and the fact that the plaintiff received a payment of Rs. 60 towards the interest on the amount of the promissory note could not be taken as a circumstance from which waiver of any such charge could be inferred. The learned District Judge was of the opinion that the recital in the sale deed showed that the entire consideration had been paid partly in cash and partly by the execution of the suit promissory note. He was also of the opinion that as the whole of the purchase money was paid there was no statutory charge in the case. He summed up his conclusion thus:

"I am of opinion. after careful consideration, from the language used in the sale deed itself, from the evidence of the plaintiff himself on the point and from the other circumstances, that the intention of the parties in this case was that the execution of the promissory note was to be treated as equivalent to payment of the purchase money *pro tanto* and that the promissory note was not taken merely as a collateral security."

The question is, is the conclusion of the learned District Judge correct? The sale was for a sum of Rs. 1,C00 and the receipt of the consideration is expressed thus:

"For my business I have received Rs 8C0 by way of cash and by way of bond and the amount which I have agreed to receive before the Sub-Registrar is Rs. 200."

It is plain therefore from these recitals that the consideration for the deed is a sum of money. The evidence of the plaintiff does not carry the matter further except establishing the fact that what was received in cash out of the sum of Rs. 800 was only Rs. 300 and for the balance of Rs. 500 a promissory note was taken and the bond referred to in the promissory note for Rs. 500 which carried interest at one per cent. per mensem. With reference to the other circumstances referred to by the learned Judge, Mr. Krishna Rao for the defendants 2

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and 3 stated that the only circumstance in the case was the receipt of the payment of interest of Rs. 60 under the promissory note and there were no other circumstances in the case. Therefore on these admitted facts the question arises whether the plaintiff has no statutory charge for the sum of Rs. 500 covered by the said suit promissory note, and if he had a charge, whether he could be said to have waived it. As pointed out by their Lordships of the Privy Council in *Webb* v. *Macpherson*[1], the statutory charge conferred by S. 55 (4) (*b*) of the Transfer of Property Act differs from the vendor's lien under the English Law and that in order to exclude the charge given by the statute, the Court has to find something either express contract or at least something from which it is a necessary implication that there is such a contract. Their Lordships further pointed out that the charge would not be excluded by any contract, covenants, or agreement with respect to the purchase money. It will be seen that under S. 55 (4) (*b*) of the Transfer of Property Act the charge subsists in every case where the amount of the purchase money remains unpaid either for the whole or for the part remaining unpaid. What is necessary therefore is payment in fact or what in law would constitute such a payment. With reference to a vendor's lien under the English Law it was held that the mere fact that the consideration was stated in the deed as having been received and the receipt of the vendor endorsed on it would not, as between a vendor and vendee and anybody claiming under the latter with notice of non-payment, amount to an abandonment of the vendor's lien (*vide* the observations of Lord Eldon in *Mackreth* v. *Symmons*[2]), and the taking of a bill or a promissory note was held not to discharge such a lien. (Vide *Grant* v. *Mills*[3].) The same rule will apply to the case of a statutory charge. A bill or note is always taken as a conditional payment; the law recognises it as a payment, but if a bill or note is dishonoured, the obligation to pay the amount covered by it would remain and is never put an end to. Lord Redesdale in *Hughes* v. *Kearney*[4], puts the position thus:

"Suppose bills given as part of the purchase money, and suppose them

1. (1903) 13 M.L.J. 389: L.R. 30 I.A. 238: I.L.R. 31 Cal. 57 (P.C.).
2. (1808) 15 Ves. Jun. 329 at 337: 33 E.R. 778.
3. (1813) 13 R.R. 101.
4. 1 Sch. and Lef. 132: 9 R.R. 30 at 33.

drawn on an insolvent house, shall the acceptance of such bills discharge the vendor's lien? They are taken, not as a security, but as a mode of payment." Krishna-swami Mudaliar *v.* Vijia-raghava Pillai.

In *Winter* v. *Lord Anson*1, the facts were as follows: William Winter entered into an agreement to sell his property to William Mousley. The agreement provided that the amount of the consideration should be secured by a bond of Mousley to Winter with interest at 4 per cent. and should remain so secured during the life of William Winter on the regular payment of such interest. The sale deed was subsequently executed wherein it was recited that the amount of consideration, namely, £1,485 was stated to have been paid but in fact only £485 was paid and for the balance Mousley executed a bond to Winter in the penal sum of £2,000 conditioned to be void on payment of £1,000. The question was whether the acknowledgment in the document of the consideration having been received and the taking of a separate bond discharged the lien so that the assignees of the vendee, who took with notice of such non-payment of the consideration, were held entitled to keep the estate without payment of the same. Lord Chancellor Lyndhurst held that the vendor's lien was not discharged and the assignees were bound to pay the money. Apart from the fact that the bill is a conditional payment, the Vice-Chancellor Shadwell explained the reason of the rule in *Buckland* v. *Pocknell*2 thus:

"Where the consideration is to be money paid down, and the money, in fact, is not paid, but a conveyance is made as if it had been paid, and that is all; or, if there be, in addition to it, the giving merely of a note or bond, still, in substance, the vendor has not that which, in point of justice he ought to have. . . . ."

The question in this particular case also is whether it appears from the sale deed the plaintiff has got what he contracted to have. There is no doubt that he contracted to have a sum of Rs. 800 and he has not got it; he got only Rs. 300 and the balance had to be paid. It will be seen that the consideration was not the execution of a bond but payment of a sum of Rs. 200. Therefore the promissory note itself is not the actual consideration but was taken merely as a security for the purchase money. As observed by Sugden in his book on Vendors and Purchasers,

"There is a marked distinction between a conveyance as for money paid with a separate security for the price whether by covenant, bond or note and

1. (1827) 38 E.R. 658.
2. (1843) 13 Sim. 406: 60 E.R. 157 at 159.

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a conveyance expressed to be in consideration of covenants which the purchaser enters into by the deed itself."

This principle was applied by their Lordships of the Privy Council in *Webb* v. *Macpherson*[1], and they made the following observations:

"There is no doubt, both on principle and authority, that a conveyance or sale in consideration of a covenant to pay a sum of money in the future is different from a sale in consideration of money which the purchaser covenants to pay."

Therefore the taking of the bond in this case cannot be construed as a covenant to pay a sum of money in the future within the meaning of the observations of the Privy Council. On exactly similar facts a Division Bench of this Court in a case reported in *Vellappa Chettiar* v. *Narayanan Chettiar*[2], held that the statutory charge would subsist. The facts in that case were as follows: The plaintiff agreed to sell a certain property to the first defendant for Rs. 17,000 on the 10th October, 1900. The consideration was to be secured by two documents (1) a hundi for Rs. 3,000 and (2) a promissory note for Rs. 14,000. The sale deed was executed on 19th September, 1901 and the recital as to the consideration ran thus:

"The amount that I have received in accordance with the varthamanam executed by me on 10th October, 1900, by means of hundi drawn by you directing Seenu Pillai, agent of your Mannargudi shop to pay is Rs. 3,000. The amount that I have received in the matter of your having executed a promissory note in my favour on the said date is Rs. 14,000. Total for the two items, is Rs. 17,000. As I received this sum of rupees seventeen thousand as per above particulars and I have executed in your favour the deed of absolute sale, you shall enjoy the undermentioned lands, house, etc. . . . . ."

For the sum of Rs. 14,000 a renewed promissory note was executed on 24th September, 1903 and on that renewed pronote a suit was filed for the recovery of the amount due thereunder and sale of the property was also asked for in enforcement of the statutory charge under S. 55 (4) (*b*) of the Transfer of Property Act. The learned Judges (Miller and Abdur Rahim, JJ.) held that the plaintiff took the pronote as security for the unpaid purchase money and that the charge was not extinguished by the taking of the promissory note. It would thus be seen that the facts were almost similar to those in the present case and that the said decision is a conclusive authority against the contention of respondents 2 and 3. The learned District Judge relied on the subsequent payment of Rs. 60 under the promissory

1. (1903) 13 M.L.J. 389: L.R. 30 I.A. 238: I.L.R. 31 Cal. 57 (P.C.).
2. (1913) M.W.N. 826: 18 I.C. 81.

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note as a circumstance negativing the existence of the charge or as a circumstance indicating a waiver. It is not possible to understand how the payment of interest for detention of the money can be taken as evidence of a waiver of the lien. Even the statute provides for payment of interest on unpaid purchase money. In almost every case where a bond or promissory note is taken, interest will be provided for. The learned District Judge was influenced in his decision by the case reported in *Krishnaswami* v. *Subramania Ganapatigal*[1], where on a similar recital as in the sale deed and on the consideration also of a payment of interest on a promissory note the learned Judges took the view that there was a waiver of the statutory charge. But that case is distinguishable. In that case, apart from these two circumstances, there was the additional fact that though the sale was by two vendors, the promissory notes were executed by one vendee in favour of the two vendors separately, and the suit was brought by one vendor without making his co-vendor a party. Therefore on the facts of that particular case their Lordships came to the conclusion which they did. It is unnecessary to canvass the correctness of that decision because the learned Judges did not lay down any principle of law which is in conflict with the well-accepted principles governing this branch of law because they themselves recognised that where a vendor takes a promissory note from a vendee, it does not necessarily follow that he has given up the statutory lien and even when a promissory note is given by a third person that fact raises no presumption that the lien has been abandoned. I may state that Mulla in his Transfer of Property Act, 2nd edition, seems to think that the case in *Krishnaswami* v. *Subramania Ganapatigal*[1] was not correctly decided. I have come to the conclusion that there is nothing in the language of the document or in the evidence of the plaintiff or in any of the surrounding circumstances which would enable the Court to say that there was no statutory charge or that the statutory charge had been abandoned. I may point out that the learned District Judge was of the opinion that if it were held there is a charge, then the plaintiff could not be said to have waived the charge and defendants 2 and 3 must be deemed to have notice of the existence of it.

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1. (1917) 35 M.L.J. 304.

Krishnaswami Mudaliar v. Vijiaraghava Pillai.

I therefore reverse the decision of the learned District Judge and restore the decree of the learned District Munsif with costs throughout. This judgment will not prevent defendants 2 and 3 from availing themselves of such right as they may have under Madras Agricultural Relief Act IV of 1938 and the amount decreed now will be subject to the result of any application they make with the said Act.

Leave to appeal refused.

B. V. V. —— *Appeal allowed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice,* MR. JUSTICE WADSWORTH AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

Samuel Koilpillai Skinner .. *Plaintiff**

v.

Arunachalam Pandaram and others .. *Defendants.*

F.B.

Samuel Koilpillai Skinner v. Arunachalam Pandaram

The Madras Stamp (Amendment) Act (VI of 1922)—Lease for an indefinite term—If a lease for less than one year under Sch. 1-A, Art. 30 (i) (a)—Proper article applicable Art. 30 (a) (i) or Art. 30 (a) (viii).

Where a lease deed ran as follows:—"As I reside in the scheduled properties in your possession (as usufructuary mortgagee) from to-day agreeing to pay rent at Rs. 5 per mensem, I shall pay the said rent of Rs. 5 by the 30th of each month . . .", the lease is one for an indefinite term and not one for a *term of less than one year* and has therefore to be stamped under Art. 30 (a) (viii) of Sch. 1-A of the Madras Stamp (Amendment) Act, 1922 and not under Art. 30 (a) (i) of that Act. A lease for less than one year means a lease for some specified period which is less than twelve months.

Amolia v. *Ibrahim Ishak,* In re, (1919) I.L.R. 46 Cal. 804, dissented from.

Reference under Stamp Act, S. 61 (1), (1902) I.L.R. 26 Mad. 473 (F.B.), followed.

Case stated under S. 60 of Act II of 1899 by the District Munsif of Srivaikuntam in S. C. Suit No. 712 of 1937.

Parties not represented.

The Government Pleader (B. Sitarama Rao) for the Government.

The judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—This reference arises out of a small cause suit filed in the Court of the District Munsif of Srivaikuntam in which the plaintiff seeks to recover Rs. 35 as arrears of house and shop rent for a period of seven months.

* Referred Case No. 1 of 1938. 9th January, 1939.

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The terms of the tenancy are embodied in a document which is stamped with a stamp of the value of twelve annas, the appropriate amount if the document falls under cl. (*a*) (*i*) of Art. 30 of Sch. 1-A of the Stamp Act.

Sch. 1-A was added to the Stamp Act by the Madras Stamp (Amendment) Act, 1922. The question is whether it should be stamped under the provisions of Art. 30 (*a*) (*viii*) of the amended Act. Art. 30 (*a*) (*viii*) requires the same duty to be paid as on a conveyance for a consideration equal to three times the amount or value of the average annual rent which would be paid or delivered for the first ten years if the lease continued so long. If Art. 30 (*a*) (*viii*) applies the appropriate stamp will be Rs. 3, not twelve annas.

The material portion of the instrument reads as follows:—

"As I reside in the scheduled properties (house, shop and site) in your possession (as usufructuary mortgagee) from to-day agreeing to pay rent at Rs. 5 per mensem, I shall pay the said rent of Rs. 5 by the 30th of each month and obtain your receipt. In default of payment as aforesaid, I shall pay the arrear of a month's rent with interest at 4 pies per rupee per mensem together with the next month's rent. Any plea of payment without receipt shall not prevail. In case of default of even this, you shall evict me from the house at your pleasure and let in other persons as tenants."

In our opinion this is clearly a lease for an indefinite term and not one for a term of less than one year. The matter has, however, been referred to this Court as the result of the decision of the Calcutta High Court in *Amoha* v. *Ibrahim Ishak*, In re[1], where it was held that a lease of this description is a lease which purports to be for a term of less than one year and is therefore stampable under the article which now corresponds to Art. 30 (*a*) (*i*). The judgment in the Calcutta case is a short one and no reason is given for the decision. It is directly opposed to the decision of a Full Bench of this Court in *Reference under Stamp Act, S. 61 (1)*[2], where it was held that an instrument of much the same nature should be stamped under Art. 35 (*a*) (*iv*), the article corresponding to Art. 30 (*a*) (*viii*) of the amended Stamp Act. The Calcutta decision is also in conflict with two decisions of the Allahabad High Court: In the matter of *Burmah Shell Oil Storage and Distributing Company of India, Ltd.*[3] and in *Mangal Puri* v. *Baldeo Puri*[4]. In the latter case the Court considered the Calcutta decision

1. (1919) I.L.R. 46 Cal. 804.
2. (1902) I.L.R. 26 Mad. 473 (F.B.).
3. (1933) I.L.R. 55 All. 874 (F.B.).
4. I.L.R. (1938) All. 481.

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and gave its reasons for disagreeing with it. It was pointed out that it did not follow that because a document was a monthly tenancy within the meaning of S. 106 of the Transfer of Property Act it was a lease for less than one year. A lease for less than one year meant a lease for some specified period which was less than twelve months. With these observations we are in entire agreement. Consequently we hold that the lease now under consideration was improperly stamped and should have been stamped under Art. 30 (*a*) (*viii*) with a stamp of the value of Rs. 3.

S. V. V. —— *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

Nachimuthu Goundan and another .. *Appellants* in Appeals and Petitioners (Defendants 3 and 6)*

v.

Balasubramania Goundan minor by mother and next friend, Kaliyammal ... *Respondent in all (Plaintiff).*

Nachimuthu Goundan v. Bala-subramania Goundan.

Hindu Law—Debts—Liability of surviving partners to account for deceased partner's share—If a "debt" under Hindu law "antecedent" to the mortgage executed in discharge of it.

Two brothers who started and carried on a "Mill" business for a few years presumably with family funds were obliged to take a new partner whose contribution of capital enabled them to meet the debts then owing and to continue the business. The new partnership was to run for five years and the profits and losses were to be shared equally between the new partner on the one hand and the two brothers (the original partners) on the other. If any partner wished to separate before the due date, he should forfeit his share of profits and receive the balance of principal after deducting his loss therefrom after the expiry of the period of partnership.

Dissolution of partnership resulted from the death of the new partner within four months of the agreement. The deceased partner's son being a minor his mother did not wish to continue the partnership and wanted the accounts to be taken, the share of the deceased partner ascertained and the dues paid over to her. The amount due was ascertained on taking of accounts with the help of mediators. In discharge of it some outstandings of the business were assigned and a mortgage was executed for the balance. Within a few months of the mortgage one of the mortgagors died leaving four sons and a grandson.

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* App. No. 235 of 1934, A. A. O. No. 312 of 1935 and C. M. P. No. 4443 of 1938.

24th October, 1938.

Nachimuthu Goundan *v.* Bala-subramania Goundan.

In a suit on a mortgage the sons and grandson of the deceased mortgagor pleaded that the mortgage as such could not affect their share of the mortgaged property, as till settlement of partnership accounts there was no debt as such in law but merely a duty to account and as also consideration for the mortgage was not an antecedent debt.

Held, the unascertained liability of the two brothers was a debt according to Hindu law from the time the capital was brought into the partnership and it was both antecedent in time and independent in origin from the mortgage. The mortgage was binding on the sons.

Sabju Sahib v. *Noordin Sahib*, (1898) I.L.R. 22 Mad. 139, referred.

Doraisami Padayachi v. *Vaithilinga Padayachi*, (1916) 32 M.L.J. 422: I.L.R. 40 Mad. 31 (F.B.), distinguished.

Thirunavukarasu Chetty v. *Muthukrishnan*, (1931) M.W.N. 467, not followed.

Original texts and case-law reviewed.

Appeal against the decree of the Court of the Subordinate Judge of Coimbatore in O. S. No. 183 of 1932.

K. Rajah Aiyar and *M. Krishna Bharathi* for Appellants in both.

T. R. Venkatarama Sastri and *N. Somasundaram*, for Respondent in both.

The judgment of the Court was delivered by

Krishnaswami Aiyangar, J.

Krishnaswami Aiyangar, J.—The question for decision in this appeal is whether the mortgage sued on is binding on the undivided sons of the mortgagors. The argument against it is that there was neither an antecedent debt nor a justifying necessity and in its absence the father had no authority to bind by his act the interest of his sons in the joint property. No new principle of law is therefore involved in the decision of this appeal: for the doctrine of antecedent debt is at least as old as *Suraj Bunsi's case*[1] if not older still and has now been finally and authoritatively declared by the Privy Council. Though the rule itself in this form does not find express mention in the Texts of Hindu Law or the commentaries, there can be no doubt that it is but the logical outcome of the fundamental principle stated in the Mitakshara, Chapter I, Ss. 27, 28. The author says:—

"Therefore it is a settled point that property in the paternal estate is by birth, although the father has independent power in the disposal of effects other than immovables, for indispensable acts of duty and for purposes prescribed by Texts of law as gifts through affection, support of the family, relief from distress and so forth, but he is subject to the control of his sons

1. (1879) L.R. 6 I.A. 88: I.L.R. 5 Cal. 148 (P.C.).

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and the rest in regard to immovable estate, whether acquired by himself or inherited from his father or other predecessor; since it is ordained that though immovables or bipeds have been acquired by a man himself, a gift or sale of them should not be made without convening all the sons. They who are born and they who are yet unbegotten and they who are yet still in the womb require the means of support; no gift or sale should therefore be made. Even a single individual may conclude a donation, mortgage or sale of immovable property during a season of distress for the sake of the family, and especially for pious purposes."

The underlying object of the restriction is plain enough, namely, the conservation of the family substance for the benefit of the existing and future members of the family. In a loose though not in a strict legal sense the family property in the hands of the father or the manager may perhaps be termed a trust for the family itself conceived as a continuing unit. It was in this sense that in *Sahu Ram Chandra* v. *Bhup Singh*[1], Lord Shaw observed as follows:

"In short, it may be said that the rule of this part of the Mitakshara law is that the joint family state is in this position. Under his management he (the father) can neither obtain money for his own purposes for it nor can he obtain money for his own purposes upon it. To permit him to do so would enable him to sacrifice those rights which he was bound to conserve. This would be equivalent to sanctioning a plain, and it might be, a deliberate breach of trust The Mitakshara law does not warrant or legalise any such transaction."

Once it is realised that it is a kind of trust, that lies at the foundation of the restriction (see also *Venkataramaswami* v. *Imperial Bank of India at Rajahmundry*[2], it will be easy to understand its scope as well as its applicability. At first sight, it may look as if there is very little purpose in requiring that there should not only be a debt but that it must also be an antecedent one. According to Hindu Law it is equally the pious obligation of the son to discharge the father's debt, whether it had been antecedently or was concurrently incurred. Both have to be met from out of the family estate, and there is no escape from either except by the practice of fraud or dishonesty. If accordingly the family property is the fund out of which both classes of debt have to be met, no rational distinction could be made between the two and this indeed was the view of such eminent Hindu Judges as Sir V. Bhashyam Aiyangar, J., in *Chidambara Mudaliar* v. *Koothaperumal*[3] and

1. (1917) 33 M.L.J. 14: L.R. 44 I.A. 126: I.L.R. 39 All. 437 at 447, 448 (P.C.).
2. (1938) 2 M.L.J. 461 at 466 (F.B.).
3. (1903) 14 M.L.J. 181: I.L.R. 27 Mad. 326.

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Bannerji, J., in Allahabad, *Chandradeo Singh* v. *Mata Prasad*[1], and it was not till the Privy Council finally pronounced against it that the true basis of the principle emerged into view (*Sahu Ram Chandra* v. *Bhup Singh*[2], *Raja Brij Narain Rai* v. *Mangla Prasad Rai*[3], *Venkataramanayya Pantulu* v. *Venkatarama Dass*[4] and *Arumugham Chetty* v. *Muthu Koundan*[5]). What appears to be a cogent explanation is given by Aikman, J., in *Chandradeo Singh* v. *Mata Prasad*[1], where he has observed as follows:—

> "At first sight it seems that there is little distinction in principle between a mortgage given for an antecedent debt, and a mortgage for a debt incurred for the first time when the mortgage is executed. But if the distinction is observed, it will tend to preserve the property in the family as it will render it more difficult for a Hindu father to incur debts which might ultimately have the effect of dissipating that property."

In other words the creditor will have one more hurdle to jump and the family will have a little more time to avert the threatened danger. At this time of day it is perhaps pointless to enter into a discussion of the reason of the rule for the rule itself has now been clearly and unequivocally settled by the decisions of the highest tribunal. It is with the application of that rule or rather the meaning of the word 'debt' in the phrase 'antecedent debt' that we are concerned in this appeal remembering that the corresponding term in the Sanskrit text is ऋण.

The facts of this case lie in a narrow compass. Two brothers who had themselves started a mill business and carried it on for some years presumably with the aid of family funds were obliged in April, 1925, to take a new partner whose contribution by way of capital enabled them to meet the debts then owing and to continue the business itself. The new partner was plaintiff's father who paid a sum of Rs. 20,000 towards his share of the capital, an equal sum represented by the value of the business premises and the plant and machinery therein belonging to the brothers being treated as their contribution. The partnership was to run for a period of five years and the profits and losses were to be shared equally between the plaintiff's father on the one hand and the two brothers together on the

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1. (1909) I.L.R. 31 All. 176 (F.B.).
2. (1917) 33 M.L.J. 14: L.R. 44 I.A. 126: I.L.R. 39 All. 437 (P.C.).
3. (1923) 46 M.L.J. 23: L.R. 51 I.A. 129: I.L.R. 46 All. 95 (P.C.).
4. (1905) 16 M.L.J. 69: I.L.R. 29 Mad. 200 (F.B.).
5. (1918) 37 M.L.J. 166: I.L.R. 42 Mad. 711 (F.B.).

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other. Cl. 4 of the partnership deed which is the only relevant clause is as follows:—

"It was agreed that we should conduct the business.......... up to the said period and, at the end of the period, compare the purchase, etc., and all accounts duly maintained and divide the net profit and/or loss in equal shares, one half for the individual No. 1 (the plaintiff's father) and the other half for the individual Nos. 2 and 3 (the two brothers). So, if any of us is willing to separate himself from us before the due date, such person should forfeit the profit relating to his share and receive the balance of principal after deducting his loss therefrom after the expiry of the period of the partnership."

Long before the period expired, and indeed within four months after the new partnership, the plaintiff's father died, and the partnership became dissolved. The plaintiff being a minor, his mother wisely decided not to continue the partnership any longer and desired that the partnership accounts should be taken, the share of the deceased partner ascertained and paid over to her. The accounts were accordingly taken with the assistance of certain mediators and a sum of Rs. 30,294-13-4 was found due. For a portion of that amount, namely, Rs. 14,732-13-4, outstandings of the business were assigned to her and for the balance of Rs. 15,562 the suit mortgage was executed. The assignment is Ex. B dated 1st September, 1925, and the mortgage, Ex. A, dated 30th August, 1925. Both these documents were in fact parts of one transaction and were brought into existence close upon the settlement of the partnership accounts, and in order to implement it. Subsequent to the mortgage one of the brothers Krishnaswami Goundan died within a few months leaving four sons, defendants Nos. 2 to 5 and a grandson, defendant No. 7. The other brother Vellai Goundan is the first defendant, and his son is defendant No. 6. The main defence to the suit was that pleaded by these sons and grandson, namely, that the mortgage as such could not affect their shares in the mortgaged property as until the settlement of the partnership accounts which was practically simultaneous with the mortgage, there was no debt as such in law, but merely a duty to account. It was accordingly urged that the requisite conditions of antecedent debt were not present in this case as the mortgage was not really or sufficiently disconnected from the precedent debt in point of fact or time. In the Court below it appears to have also been urged that the business in question was in the nature of a speculative trade, that a debt incurred in it, even regarding the deceased partner's interest in

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the partnership assets as a debt, should be held to be of an immoral or illegal nature. But this contention was rightly and summarily overruled, and has not been repeated before us.

The only question then is whether the consideration for the mortgage was an antecedent debt in the sense in which that expression is understood in Hindu law. The argument for the appellant is that until the accounts are taken and the liability ascertained, it is impossible to posit that there is or will be a debt due by one partner to the others or *vice versa*. The liability to account of a partner or partners in a running or even a dissolved partnership does not, it was argued, amount in law to a debt in being, but was merely the possibility or contingency of a debt to arise in the future. Till it is known how the accounts stood, it was urged there could be no debt and no partner liable for it. The appellant's learned Advocate was not prepared to go the length of saying that in no case of unsettled accounts could there be a debt in law even if there remained nothing more than a pure arithmetical calculation to arrive at the correct figure. What he did urge was that so long as there was no debtor and creditor relationship established, no debt could come into existence and that in a partnership there is no such relationship until the business is dissolved and until the liability of the partners *inter se* is ascertained by the taking of the usual accounts.

There may be some support for this argument if one confines one's attention to the meaning of the word 'debt' according to its common law acceptation. Jenks' definition is that it is:

"a *definite sum* of money recoverable from one person (the 'debtor') by another person (the 'creditor') by means of a common law action; whether payment can be claimed immediately or not." (Jenks' Digest of English Civil Law, Book III, Title II, S. 1620.)

The action of debt lay according to Anson (Anson's Law of Contract, 17th Edn., p. 53; Pollock's Principles of Contract, 10th Edn., pp. 135 and 136):

"For *liquidated* or *ascertained* claims arising either from breach of covenant, or from non-payment of a *sum certain* due for goods supplied, work done, or money lent."

The qualification that the claim in respect of a debt so called, should be *definite, ascertained* or *liquidated* has its roots in the old common law action of debt which was proprietary in

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character, and was in fact a claim for the recovery of money by way of restitution, rather than the enforcement of an obligation arising out of contract (Pollock and Maitland's History of English Law, 2nd Edn., Vol. II, 203 to 207). Its supersession by *assumsit* or the *indebitatus* count, the practical abolition by the Common Law Procedure Act, 1852, of the distinction between debt and assumsit, and the doing away altogether with the formal pleadings of the Common Law Courts by the Judicature Act, 1873, are familiar knowledge to the Student of English Legal History. (Holdsworth's History of English Law, Vol. II, pp. 366, 367 and III, pp. 420, 421, 442, 443; Anson's Law of Contract, 17th Edn., page 44.) The distinction between debt and damages, the former relating to a liquidated claim, and the latter generally to an unliquidated demand still clings to English legal phraseology and still exerts a limited, none the less real influence on modern English jurisprudence. With that technical narrow meaning of the word we are not here concerned. For we are not considering a proposition of English Law or the provisions of a Statute based on that law. We have on the contrary to deal with a totally different subject and a totally different system of law. We have in fact to assign a meaning to the word *'Rina'* according to the sense in which that word has been used in the texts of Hindu Law. To such a word and in such a context, are we to apply the English Common Law meaning of the word or are we to go back to those texts themselves and to the language in which they have been clothed, in order to ascertain the true meaning of the word *'Rina'* indifferently rendered as debt in English and occurring in the modern text books and in the decision of the Courts when defining the obligation of a Hindu son to relieve his father from the sin of the undischarged debt?

The narrower interpretation will at once lead to obvious and startling consequences. The larger and more numerous obligations arising out of contracts and quasi-contracts, trusts and other fiduciary relationships though leading to monetary liability and without the slightest taint of immorality or illegality in any of them, will fall outside the pious duty. And yet we find the texts full of passages *Garuda Sanyasayya* v. *Nerella Murthenna*[1] and the reports full of cases, in which obligations which are far

1. (1918) 35 M.L.J. 661.

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removed from debt in the narrow sense have been clearly recognised. Brihaspathi in describing the fate of a debtor who dies without having discharged a debt refers to him as one who received a sum *lent* or *the like* (Colebrooke's Digest I, 228, attributed also to Katyayana). According to Katyayana, the son is bound to carry out what an ancestor has *promised* for religious purposes (Colebrooke's Digest I, 206). Usanas obviously understands *Rina* in the wider sense, though of course he excludes certain categories as falling outside the limits of the obligation, being *Avyavaharika* in nature or origin. According to the texts, a surety debt, commercial tolls, debts due for spirituous liquors, for lustful pleasures, gambling debts, unpaid fines, promises without consideration had in terms to be excluded as otherwise, being *rinas* the sons would be bound to discharge them by reason of their pious obligation (*see* the texts collected in *Chhakauri Mahton* v. *Ganga Prasad*[1].) The words *"dhana"* and *"rina"* (Manu ऋणे धने च), *Riktha* and *Rina* (Yagnavalkya, Chapter II,119. ऋक्थमृणम्) coupled together in the texts, seem to have been so used in a comprehensive sense, for describing all varieties of divisible assets and liabilities. Otherwise obligations other than debts strictly so called would bind only the man who incurred them while he is alive and will die with him when he dies and though alive or dead, the family assets in his hands will be divisible among the sons while the liabilities will be left unprovided for. Such an absurdity could not have been in the contemplation of the authors of the Texts and we at any rate do not feel justified in attributing it to them, in the absence of clear and definite words to the contrary. If *dhana* includes in its connotation all varieties of property and assets, we see no reason why *rina* should not be held to include all varieties of obligations and debts as well. Apart from the texts of Hindu Law, the word has been frequently used in the wider sense in Sanskrit literature. Witness for instance the well-known Vedic Text referring to the triple debt which attaches to a Brahmin at birth जायमानो वै ब्राह्मणस्त्रि भिरृणवा जायते ब्रह्मचर्येणऋषिभ्यो यज्ञेन देवेभ्यः प्रजया पितृभ्यः ॥ other instances could be easily multiplied.

Coming to the decided cases on the point in *Garuda Sanyasayya* v. *Nerella Murthenna*[2], the sons were held liable for the unaccounted collections made by a father out of the trust

1. (1911) I.L.R. 39 Cal. 862. 2. (1918) 35 M.L.J 661.

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estate under his charge and the learned Judges Wallis, C.J. and Seshagiri Aiyar, J., refused to recognise the subtle distinction as they called it, between accountability and debt. In a later case, *Muthammal* v. *Sivakami Ammal*[1], in which the point was more directly raised, the learned Judges considered the question of the liability of the son to pay mesne profits decreed against the father and held that their pious obligation extended to it. The case is instructive for the collection of cases in which the liability was established against the sons in respect of a variety of causes of action far removed from debt in the limited sense. In none of them, it is noteworthy, was it disputed that there was a debt but only that the debt was not of a nature which would bind the son's interest. Venkatasubba Rao, J., explained the position in these words:

"It was contended that the obligation to pay mesne profits is not in the nature of a debt, that it is not in fact '*rina*' which means strictly 'what is taken under a promise to repay'. We agree with Mukerjee, J. (see *Chhakauri Mahton* v. *Ganga Prasad*[2] that the word '*rina*' as used in the texts has a much wider application than a mere debt or loan. I am prepared to go further than merely hold that at any rate, a judgment-debt comes within the expression '*rina*'; for, if this narrow construction be adopted, a son can be held liable only after a decree is passed against the father; whereas, if he is originally impleaded in the suit for damages, he can resist it, on the ground that there has been no debt, as there has not been a judgment. This would be a clear anomaly."

The other learned Judge Madhavan Nair, J., was also of the same opinion (*Muthammal* v. *Sivakami Ammal*[1]. See also *Natasayyan* v. *Ponnusami*[3]). Quite recently a bench of the Allahabad High Court has expressed a definite preference for the wider interpretation of the word as including a liability for unliquidated damages arising on a breach of contract by the father. We are in entire agreement with the observations of the learned Judges who declined to accept the stricter meaning of the word '*rina*'. They said:

"If we carry it to its logical conclusion, the liability of a son to pay the antecedent debts of his father would not extend to any liability incurred otherwise than by the advancing of a sum in cash to the father. We cannot believe that this was the intention of the author of the text (Brihaspathi, Vol. 33, Maxmuller's Sacred Books of the East, page 319). We cannot believe for instance, that a son would not be liable to pay the unpaid price of a commodity which had been bought by his father or to pay rent due by his

1. (1925) 21 L.W. 606 at 630. 2. (1911) I.L.R. 39 Cal. 862 at 877.
3. (1892) 3 M.L.J. 1: I.L.R. 16 Mad. 99 at 104.

father as a tenant (according to English Law an action of debt lay at Common Law). We think that the son is bound to pay any sum which is lawfully due from the father provided that the father's liability is not in any way tainted with immorality." (*Chatar Sen* v. *Raja Ram*[1].)

These authorities are sufficient to negative the appellant's contention. It may, however, be observed that even if the word *rina* in Sanskrit is to be understood as meaning a debt, there is no warrant for importing into it the technical sense in which it has become wrapped up by the peculiarities of the old English Common Law and Procedure. Almost every English Dictionary includes obligation among the meanings of the word "debt", though ordinarily the word does mean that which is due from one person to another or what is owed. We even speak, metaphorically perhaps, of owing a debt of gratitude. But whatever may be the meaning which a layman or a lawyer speaking the English language may attach to it, we are unable to say that the word 'debt' is the exact equivalent of *rina* in Sanskrit at any rate with all the technical import that that word carries. Moreover the word '*rina*' has passed into colloquial use in the wider sense in most of the vernaculars of the presidency. It is not capable of being fully or definitely expressed in any single English word. Like the words, *Satya* or *Dharma* which are but imperfectly translated as truth or duty, the word *rina* also is often rendered though loosely, as debt, though such a rendering is sufficient enough for practical purposes. But when it becomes necessary to ascertain its significance for apportioning rights or liabilities, we must determine it not by reference to its English equivalent but by the original Sanskrit word itself, giving to it just the meaning in which it is used or understood in the parent language in its literal or even colloquial sense. What we cannot agree to is the attempt first to regard debt as a perfect synonym and then to understand it in the archaic sense in which the word was understood in the now obsolete old forms of Common Law actions. We must accordingly hold that the unascertained liability of the two brothers was a debt according to Hindu Law incurred by them in favour of the plaintiff's father from the time when the latter brought into the partnership the sum of Rs. 20,000 subject to its being returned with a reduction in case of loss or an addition on account of profit. It was thus

1. I.L.R. (1938) All 58 at 61, 62.

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both antecedent in time and independent in origin from the mortgage which, it is plain, could not have been in the contemplation of the parties when the capital was brought in. What was in fact contemplated was, as appears from the partnership deed, something totally different from what actually led to the execution of the mortgage. The test must therefore be held fully satisfied, antecedency in time and dissociation in fact being thus established.

It was urged that the word 'debt' has been defined in some Indian cases in such a way as to exclude a liability for an amount to be yet ascertained by the taking of accounts. Two cases were cited both of which proceeded on the meaning of the word as used in two different statutes, and it was held that such a liability cannot be regarded as a debt within the meaning, in one case of S. 4 (1) (*a*) of the Succession Certificate Act (VII of 1889) and in the other, within S. 25 of the Contract Act (IX of 1872). In *Sabju Sahib* v. *Noordin Sahib*[1], Subramania Aiyar, J., to whom the case was referred on a difference of op'nion between Shephard, O.C.J. and Benson, J., held relying on *Johnson* v. *Diamond*[2], that the liability arising from such an obligation could not be held to be a debt in the accepted legal sense of the term for the obvious reason that the liability was not in respect of a liquidated sum. It is not without interest that Benson, J., who took what may be called a common sense view of the matter, dissented, holding that when the accounts are taken and the sum due is ascertained, that sum while yet it remained unascertained was a debt within the Act. In *Doraisami Padayachi* v. *Vaithilinga Padayachi*[3], a promise to pay the amount which may be found due by an arbitrator on the taking of accounts between the parties was held not to amount to a promise to pay a debt within the meaning of S. 25 of the Contract Act, the amount not being a liquidated sum. These decisions, whatever their value may be in the construction of statutes which have employed the English legal terminology, have no bearing on the meaning to be given to the expression in a different context, in a different language and for a principle of law altogether alien to the English system. The decision in *Thirunavukarasu Chetty* v. *Muthu-*

1. (1898) I.L.R. 22 Mad. 139.
2. (1855) 11 Exch. Rep. 73: 156 E.R. 750.
3. (1916) 32 M L.J. 422: I.L.R. 40 Mad. 31 (F.B.).

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krishnan[1], is, however, directly in point, and is not to be distinguished in this way though it was sought to distinguish it from the present case on the facts. The mortgage in that case was given by one partner to the other in a running partnership for the amount due on an investigation of the accounts necessitated by the bad faith of the mortgagor. The learned Judges who decided the case held that until the settlement of the partnership account as such was arrived at, the relationship of creditor and debtor did not exist between the parties, and there could not be said to have been any debt existing antecedently to the mortgage. With respect, we find ourselves unable to accept this dictum as a correct statement of the Hindu law on the point. Their attention does not appear to have been called to the meaning of the word *rina* as explained in the cases cited above, nor was the rule of the Hindu law on this point put specifically before them. We therefore feel that we are at liberty to come to an independent conclusion for ourselves on a consideration of the relevant material which we may observe, had not been placed before them, and we think that our interpretation is more consistent with the texts and the principles of the Hindu Law.

A word about the distinction that was sought to be made on behalf of the respondent. It was urged that whether or not the liability of some partners to the other or others in an undissolved partnership is a debt, the moment a dissolution takes place there arises in law a debt properly so called, as there could be no more fluctuation and uncertainty about the rights of partners, as by reason of the dissolution all further transactions necessarily stop. Reliance was placed on S. 43 of the English Partnership Act, 1890, which runs as follows:

> " Subject to any agreement between the partners, the amount due from surviving or continuing partner or partners to an outgoing partner or the representatives of a deceased partner in respect of the outgoing or deceased partner's share is a debt accruing at the date of the dissolution or death."

It was argued that this statutory provision is merely a declaration of the common law on the point, and hence in the case on hand, unlike the case referred to above, the partnership became dissolved on the death of the plaintiff's father, an event

1. (1931) M.W.N. 467.

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which took place an appreciable time before the mortgage. We may observe that no such provision is found in the Indian Act and even according to English Law, it would seem that partners stand in a fiduciary relation to each other (Lewin on Trusts, 13th Edition, page 253), whether or not they are trustees in the full and proper sense of the word. (See *Knox* v. *Gye*[1], per Lord Westbury. *Cf.* observations of Lord Hatherley, page 678. *See also* S. 29 of the English Partnership Act, 1890; *Vyse* v. *Foster*[2].) Out of this relation arises in favour of the representative of a deceased partner not necessarily a debt, but a right which consists in having an account of the property, of its collection and application, and on receiving that portion of the clear balance that accrues to the deceased's share and interest in the partnership. The representative of a deceased partner has no specific interest in or claim upon any particular part of the partnership estate. The whole property therein accrues to the surviving partner. Whether the effect of S. 43 of the English Act is anything more than the putting to an end of all difficulties in the way of the application of the rule of limitation to such a cause of action, it is not easy to determine. It is however not necessary to pursue the matter, as in our view there was in this case an antecedent debt according to Hindu Law, and the mortgage was executed to discharge it.

The appeal accordingly fails and is dismissed with costs subject to the decision of the lower Court on the petition presented by the appellants under Madras Act IV of 1938, which will be sent to the lower Court for disposal. The court-fee on the memorandum of appeal must be paid by the appellants.

In the connected C.M.A. No. 312 of 1935, it is stated that in view of the dismissal of the main appeal no orders are necessary. It is also accordingly dismissed, but without costs.

K. C. *Appeal dismissed.*

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1. (1872) L.R. 5 H.L. 656 at 675. 2. (1874) L.R. 7 H L. 318.

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

PRESENT:—LORD MACMILLAN, LORD PORTER AND SIR GEORGE RANKIN.

Prahladrai Chooreewalla .. *Appellant**

v.

The Commissioners for the Port of Calcutta. *Respondents.*

Transfer of Property Act (IV of 1882), S. 106—Termination of tenancy—'Ordinary tenant' in Calcutta—Fifteen days' notice by landlord—Whether sufficient—Notice sent by registered post—Need for proper address.

Unless there is some indication to the contrary the term "ordinary tenant" would in Calcutta mean monthly tenant, even though there is no reference to payments of monthly rent, and such a tenancy would be terminable on fifteen days' notice expiring with the end of the month of the tenancy. That meaning will not be altered because the letter creating the contract of tenancy provides for fifteen days' notice by the lessee without mention of notice by the lessor. Such a provision might naturally be made by a tenant to safeguard his right to terminate the tenancy in fifteen days, leaving the landlord's right to be governed by the ordinary rule. The mere omission of such a provision in the landlord's favour does not even by implication prevent the landlord from relying upon his ordinary rights.

Under S. 106, Transfer of Property Act, sending by post means sending by post to the tenant's proper address.

P.C. Prahladrai Chooreewalla *v.* Commissioners for the Port of Calcutta.

Appeal from a judgment and decree of the High Court of Calcutta passed in its appellate jurisdiction.

D. N. Pritt and *W. Wallach* for Appellant.

A. M. Dunne, Sir Thomas Strangmen and *H. S. Chatfield* for Respondents.

1st December, 1938. Their Lordships' judgment was delivered by

Lord Porter.

LORD PORTER.—The respondents in this case are the owners of certain plots of land at Grierson Road, Howrah. Before September, 1932, one Gobardhan Das Deora (hereinafter called Deora) was tenant of the plots on which certain structures had been erected. A draft lease had been sent to him but it was never executed. Deora failed to pay the rent for the land and a large amount became due from him to the respondents. It was accordingly arranged between Deora and the appellant that the appellant should purchase the structures, and between the respondents, Deora and the appellant, that the appellant should become tenant of the land and certain further land at an agreed rent. The terms of the arrangement will be found in a letter

*P. C. Appeal No. 52 of 1937. Bengal Appeal No. 40 of 1936. 1st December, 1938.

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from the respondents to the appellant's solicitors dated the 21st September, 1932.

It was part of the terms agreed between Deora and the appellant that the appellant should take over and pay Deora for the structures on the land. This provision was duly carried out and from the sum so received Deora discharged the rent which was in arrear. The appellant then took possession of the land and a certificate of possession was signed by him and by a representative of the respondents on the 12th September, 1932, from which it appears that the appellant went into possession on that date under an agreement for a yearly lease beginning on the 1st October, 1932. The respondents, however, seem to have thought that the lease was to operate from the 1st September, 1932, and on the 24th October, 1932, a draft lease was sent to the appellant's solicitors. This lease was never returned. The appellant nevertheless remained in possession and for a time paid the stipulated rent, but by the 13th June, 1933, a considerable sum remained unpaid, and a suit for its recovery was pending. In these circumstances a discussion took place between the respondents and the appellant's agents and letters purporting to embody its result were exchanged between them. These letters must be set out in full as their legal effect is in dispute between the parties.

"Messrs. Talbot & Co.,
Tower House, Chowringhee Square,
Calcutta.

DEAR SIRS,

With reference to your letter No. WSV/1963, dated 20th June, 1933, and your Mr. Basil's conversation with the Assistant Secretary to day, I beg to confirm the following arrangements in regard to the land at Grierson Road, Howrah, leased to Babu Prolhadroy Churiwalla:—

1. That Babu Prohladroy Churiwalla will pay up before 1st July, 1933.

	Rs.	A.	P.
Rent for five months from February to June, 1933 ..	5,822	8	0
Cost of the suit instituted against him ..	340	0	0
	6,162	8	0

2. That Babu Prohladroy Churiwalla will hand over vacant possession of a portion of the land on the 1st July, 1933.

3. That Babu Prohladroy Churiwalla will be treated as a monthly tenant after the 1st July, 1933, in respect of the land retained by him from that date. This tenancy will be terminable by either party on 15 days' notice expiring with the end of a calendar month.

Yours faithfully,
(Sd.) S. L. Das,
Offg. Secretary."

On the 28th June, 1933, Messrs. Talbot & Co. replied as follows:—

"The Offg. Secretary,
Calcutta Port Commissioners,
Calcutta.

DEAR SIR,

re: Land in Grierson Road, Howrah.

We thank you for your letter No. 39921 of yesterday's date and, as arranged with you over the telephone to-day, have pleasure in sending you herewith our cheque for Rs. 5,822-8-0, being the amount of rent paid over to us by Babu Prohladrai Churiwalla for the months of February, March, April, May and June, 1933.

As regards the cost of the suit Mr. Churiwalla has requested us to find out whether there is any possibility of saving the stamp-fee by withdrawing the case and in such event he is prepared to pay your out-of-pocket expenses not exceeding Rs. 340. On hearing from (you) we shall take up the matter with him.

The terms of the settlement are that Mr. Churiwalla will give up whatever vacant portion of the land he can and remain as ordinary tenant from the 1st of July, 1933, and subject to the termination by giving you fifteen days' notice in writing.

Kindly let us have your stamped receipt for the cheque sent herewith.

Encl. Yours faithfully,
SAB/J. Talbot & Co."

After this exchange of letters and payment of the amount mentioned, the appellant gave up a portion of the land and continued to pay rent upon the portion retained by him up to the end of April, 1934.

Thereafter he failed to pay the rent due and on the 12th January, 1935, the Deputy Chairman of the Commissioners wrote giving him notice that his tenancy would terminate on the 31st day of January, 1935, and requiring him to give up possession on the 1st of February.

Copies of this notice were (1) sent by registered post apparently addressed to 2, Grierson Road, (2) handed to Deora for transmission to the appellant, (3) affixed upon the structures erected upon the land.

The appellant refused to give up possession on the ground that he was not a monthly tenant or subject to 15 days' notice and that, even if he were, his tenancy began either on the 12th September or the 1st October, and, therefore, a valid 15 days' notice should end on the 12th or 1st of the month and not on the 31st. He further denied that the notice had ever been served on him personally, denied that Deora was his agent to receive

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the notice and alleged that no facts had been shown justifying service by affixing the notice on the land.

The appellant's case upon the question of tenancy was that the document of the 12th September, 1932, *prima facie* showed a yearly tenancy but that owing to the provisions of the Registration Act of 1908, S. 17, he could not use that document as proof of its terms, though he might use it as an admission by the respondents for the subsidiary purpose of proving the date at which he took possession.

If then he could not prove a yearly tenancy by agreement, the terms of his tenancy were, he maintained, to be ascertained by reference to section 106 of the Transfer of Property Act by which it is enacted that:—

"In the absence of a contract or local law or usage to the contrary a lease of immovable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year terminable on the part of either lessor or lessee by six months' notice expiring with the end of a year of the tenancy, and a lease of immovable property for any other purpose shall be deemed to be a lease from month to month terminable on the part of either lessor or lessee by 15 days' notice expiring with the end of a month of the tenancy."

It was not proved, said the appellant, that the lease was for other than agricultural or manufacturing purposes and, therefore, it was not proved that 15 days' notice was sufficient.

Their Lordships will assume without deciding that the onus was on the respondents to prove a use for other than agricultural or manufacturing purposes and that the evidence does not establish such a use. The section, however, only applies in the absence of a contract to the contrary and in their Lordships' opinion the letters of the 27th and 28th June, 1933, do constitute a contract to the contrary.

If the matter rested upon the terms of the letter written by the respondents, the appellant would plainly have agreed to become a monthly tenant as from the 1st July, 1933. But it is said that the appellant's letter is not an acceptance but a counter-offer differing from the first in two respects, namely: (1) in using the term "ordinary" and not "monthly" tenant, and (2) in permitting the tenant only and not the landlord also to give 15 days' notice.

Reading the two letters together, their Lordships are of opinion that the second is upon its true construction an acceptance of the first.

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Unless there was some indication to the contrary, the term "ordinary tenant" would in Calcutta mean monthly tenant, even though there were no reference to payments of monthly rent, and such a tenancy would be terminable on 15 days' notice expiring with the end of the month of the tenancy. That meaning, in their Lordships' view, is not altered because the letter of the 28th June goes on to provide for 15 days' notice by the lessee without mention of notice by the lessor. Such a provision might naturally be made by a tenant to safeguard his right to terminate the tenancy in 15 days, leaving the landlord's right to be governed by the ordinary rule. The mere omission of such a provision in the landlord's favour does not even by implication prevent the landlord from relying upon his ordinary rights.

Nor does any difficulty arise with regard to the commencement of the tenancy—each letter stipulates the 1st of the month.

The appellant, however, maintains that even if a notice were given in good time and ending on the proper day yet it had not been proved that that notice was duly served on him. The provisions as to notice are contained in section 106 of the Transfer of Property Act and are as follows:—

"Every notice under this section must be in writing signed by or on behalf of the person giving it, and either be sent by post to the party who is intended to be bound by it or be tendered or delivered personally to such party, or to one of his family or servants at his residence, or (if such tender or delivery is not practicable) affixed to a conspicuous part of the property."

Their Lordships agree that in that section, sending by post must mean sending by post to the tenant's proper address, and they do not think it proved that the letter containing the notice was sent to the appellant's proper address. Nor do they think that Deora was the appellant's agent to receive the letter or that it has been proved that tender or delivery was not practicable so as to entitle the respondents to effect service by affixing the notice to the property. On the contrary, in their view both the Courts in India were right in deciding that service was not only practicable but had been duly effected by the delivery of the notice to the appellant himself.

The evidence is that of the peon Sadeque Khan, witness No. 1 for the repondents. He testified that he knew the appellant and that the letter was addressed to and taken by him to 3, Chandmari Road (which is admittedly the appellant's address),

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and there handed to the appellant. A receipt which he said he saw signed by the appellant and received from him was also produced. It is true that in fact the letter was addressed to 2, Grierson Road, and that the witness said in cross-examination that he came to know the appellant when the letter was delivered to and the receipt signed by him.

But the witness might readily forget the exact address of the letter and yet remember delivering it and receiving the receipt, and though he may have first seen the appellant on that occasion, the evidence gives no reason to suppose nor any indication that his knowledge of the appellant ended as well as began on that occasion.

The Subordinate Judge saw the witness and accepted his evidence and the Appellate Court came to the same conclusion as the Court below.

Their Lordships do not think that these findings of fact are materially weakened because the Subordinate Judge was under the mistaken impression that another witness on behalf of the respondents knew and recognised the appellant's signature or because the Appellate Court said the evidence was uncontradicted. In truth it was uncontradicted—the appellant himself did not attend the hearing or deny that he had received the notice and signed the receipt and the mere statement of Deora that the signature was not the appellant's—an opinion in which he may well have been mistaken—is not a contradiction of the positive evidence of the peon that he saw the appellant append his signature.

A suggestion that as by section 35 of the Calcutta Port Act the respondents could only create a lease "in meeting," so they could only determine it "in meeting" was not seriously argued before the Board and is plainly untenable.

But the appellant maintained that in calculating the amount due from him to the respondents for rent a sum of Rs. 3,000 should be deducted. That sum he undoubtedly paid to the respondents before the 24th October, 1932. He asserted that the payment was rent in advance.

The learned Subordinate Judge and the Appellate Court have held it was security for the payment of rent and there is oral and written evidence to that effect.

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No claim to this sum has been made by way of set-off or counter-claim nor any court-fee paid for that purpose. In these circumstances the Subordinate Judge held that that issue could not be raised in the action before him. Their Lordships see no reason to differ from this decision.

As in the opinion of the Board all the points taken by the appellant fail, they will humbly advise His Majesty that the appeal be dismissed with costs.

Solicitors for Appellant: *Hy. S. L. Pollak & Co.*

Solicitors for Respondents: *Sanderson Lee & Co.*

R. C. C. —— *Appeal dismissed.*

B. V. V.

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Civil Jurisdiction.]

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE MADHAVAN NAIR AND MR. JUSTICE VARADACHARIAR.

E. M. Muthappa Chettiar, legal representative of E. M. Viswanatham Chettiar (deceased) .. *Petitioner**

v.

The Commissioner of Income-tax, Madras .. *Respondent.*

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Muthappa Chettiar *v.* Commissioner of Income-tax, Madras.

Income-tax Act (XI of 1922), S. 34—Escaped income—Assessment on—Notice under S. 34 in time—Inquiry—If to be within a year.

On the application of the assessee the Commissioner was directed to refer the following question:—

"Where the Income-tax Officer has issued a notice under S. 34 can he for the purpose of assessing income which has escaped assessment rely on facts which come to his knowledge after one year from the end of the year of assessment?"

Held, all that S. 34 says is that the contemplated notice may be served within the time specified. There is nothing in the section which indicates that the inquiry is to be limited in time.

Rajendra Nath Mukerjee v. *Commissioner of Income-tax, Bengal*, (1933) 66 M.L.J. 121: L.R. 61 I.A. 10: I.L.R. 61 Cal. 285 (P.C.).

Case stated by the Commissioner of Income-tax, Madras, is as follows:—

In accordance with the High Court's order quoted above, I have the honour to refer the following case for the decision of

* O. P. No. 88 of 1937. 26th October, 1938.

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the Hon'ble Judges of the High Court under S. 66 (3) of the Income-tax Act, XI of 1922 (hereinafter referred to as the Act).

2. The reference arises out of the assessment of E. M. Viswanathan Chettiar (hereinafter referred to as the assessee) for the tax year 1932-33 under S. 34 of the income of the Tamil year Projothpathi ended 12th April, 1932.

3. The assessee was the managing member of a Hindu undivided family residing at Puduvayal within the jurisdiction of the Income-tax Officer, Karaikudi I Circle. He is now dead, and is represented by his son, Muthappa Chettiar. The family carries on money-lending business at Puduvayal (its headquarters) in British India and at Klang and Penang outside British India and is a partner in the E. M. firm, Moulmein (Burma). It also derives income from property, interest on securities and dividends.

4. For the tax year 1932-33 the family was originally assessed on 18th November, 1932, on an income of Rs. 8,277 from the money-lending business. Subsequently, in the course of the assessment for 1933-34, the Income-tax Officer discovered from the day book copies of the E. M. firm, Moulmein (in which the assessee was a partner and which in turn was an assessee on the file of the Income-tax Officer, Moulmein) that the family had invested its moneys in the names of other persons and that the interest on such investments had escaped assessment in the past. Among others, there were investments in the names of the following persons:—

(1) Valayapatti R.M.A.P.R.

(2) „ R.M.K.T. Muthuraman Chettiar.

The Income-tax Officer instituted proceedings under S. 34 for 1932-33 by issuing a notice on 13th December, 1933. He also wrote to the Income-tax Officer, Moulmein, asking him whether the interest on the above investments had been disallowed in the assessment of the E. M. firm and suggesting the re-opening of the assessment of the firm for 1932-33 under S. 34 if the interest had not been disallowed. The Income-tax Officer, Moulmein, replied finally to this reference in September, 1934, stating that the interest in question had been *allowed* in the assessment of the firm for 1932-33. In the meantime the assessee had been given extensions of time for the submission of the return. On 6th October, 1934, he filed a return in which he stated that no income had escaped assessment. On 25th February, 1935, a notice under S. 23 (2) was served on the assessee by which he was required to produce evidence in support of his return on 5th March, 1935. His agent appeared on 5th March, 1935, and asked for time to file a statement from the assessee. This was granted. On 27th March, 1935, the

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assessee filed a statement to the effect that the interest on the deposits in question had been assessed in the hands of the persons to whose credit the money stood in the books of the E.M. firm. In order to verify this statement the Income-tax Officer made a reference to the Income-tax Officer, Moulmein, on 11th April, 1935. His reply, which was received on 8th May, 1935, showed that the assessee's statement was not correct. On 15th May, 1935, the Income-tax Officer called upon the assessee to prove his allegation. On 29th May, 1935, the assessee's auditors wrote to say that the assessee could not prove the allegation and that it might be verified by a reference to the Income-tax Officer, Moulmein. On 30th May, 1935, the Income-tax Officer told the assessee, by a letter, that his allegation had been found to be incorrect, that the amounts in question had been treated as the assessee's surplus capital and that it was open to him to explain his position with such documentary evidence as he might possess. On 13th July, 1935, the assessee wrote to the Income-tax Officer saying that the interest had been assessed in the hands of the alleged payees by the Income-tax Officer, Thaton area (Burma). The Income-tax Officer doubted the *bona fides* of the explanation as the alleged payees were supposed to be assessees on the file of the Income-tax Officer, Moulmein (auditor's letter dated 29th May, 1935) and could not therefore have been assessed by the Income-tax Officer, Thaton. He thereupon reserved the case for further investigation. Early in 1936, an additional Income-tax Officer was appointed to deal with cases pending under S. 34 at Karaikudi. He took up the investigation of this case and issued a memorandum to the assessee on 18th July, 1936, stating that he proposed to complete the proceedings after giving him a final hearing and asking the assessee to appear before him on 24th July, 1936, with all account books and pass books for his bank accounts. The assessee appeared on 23rd July, 1936 (a day previous to the date fixed) and also on 28th July, 1936 and 29th July, 1936. The books and the other evidence produced by the assessee were scrutinised by the Income-tax Officer at great length. This detailed scrutiny revealed the existence of several other sums of money belonging to the family which had been kept out of the accounts relating to the year of account and also subsequent years and which had presumably been earning interest elsewhere. The following instances were brought to light:—

(*i*) During the year 1931-32 (which was the 'previous year' for the assessment under consideration) sums aggregating nearly Rs. 3,20,000 were found credited for the first time in the books in the names of the deceased mother and deceased wife of the assessee

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and of five other persons belonging to the Pudukotta State. In the next year (1932-33) these sums were transferred to the assessee's personal account. It was vaguely explained that the sums belonged to the ladies of the family who had lent them to other persons and realised them during the year of account. There was no evidence to support this explanation and the Income-tax Officer refused to accept it. He held that the money belonged to the family and must have been earning interest although not entered in the accounts.

(*ii*) Various sums belonging to the family were found to have been invested in the names of others, including Valayapatti R. M. A. P. R. and R. M. K. T. already referred to. These were also transferred to the assessee's personal account in 1932-33. The assessee's explanation was that the money belonged to the persons in whose names it stood and that he transferred it to his personal account in order to utilise it for charity in anticipation of their permission. The Income-tax Officer considered this story to be fantastic and held that the money really belonged to the family.

(*iii*) Certain investments in the vilasams, L. S. V. and O.S. V., were said to belong to the ladies of the assessee's family. He expressed his inability to produce accounts to substantiate his statement. The Income-tax Officer therefore concluded that these were further instances of money belonging to the family, but shown in the names of other persons.

(*iv*) A sum of Rs. 31,000 credited in the account of the assessee's son in 1934-35 was stated to have been received from one Ahmed Sulaiman Jeeva. No evidence was produced to show that it was in fact received from A. S. Jeeva. The Income-tax Officer thought that the money belonged to the family and was brought into the accounts for the first time in 1934-35 having been kept out of the accounts prior to that. He accordingly held that this sum had been omitted from the accounts of 1931-32.

(*v*) In the account books of M.R.M. Myitkyo, certain deposits in the names of Kandanur P.S.V.M. and P.A.L.V.V.R. were shown as repaid in Ani of Projothpathi (June, 1931) by the assessee's son Muthappa Chettiar. As there was no evidence to show from what source he got the money for the repayment of these debts, the Income-tax Officer held that it must have come out of certain secret funds of the family which had not been brought to account.

For these reasons the Income-tax Officer rejected the accounts as incomplete and unreliable and estimated the income from money-lending at Rs. 55,000.

5. The assessee's appeal to the Assistant Commissioner against the assessment was unsuccessful. He then requested my predecessor to state a case to the High Court under S. 66 (2) of the Act. My predecessor declined to do so on the ground that no question of law arose. Copies of the orders of the Income-tax Officer, the Assistant Commissioner and my predecessor are filed, marked Exhibits A, B and C respectively.

6. The assessee thereafter moved the High Court under S. 66 (3) of the Act and the High Court by its order dated 13th October, 1937, has directed me to state a case and refer the following question, which I accordingly refer, for the decision of the Hon'ble Judges of the High Court:

"Where the Income-tax Officer has issued a notice under S. 34, can he, for the purpose of assessing income, which has escaped assessment rely on facts which come to his knowledge after one year from the end of the year of assessment?"

7. S. 34 authorises the Income-tax Officer in any case in which he believes that income has escaped assessment or been assessed at too low a rate in a particular year to serve on the assessee within one year of the end of that year a notice containing all or any of the requirements which may be included in a notice under S. 22 (2) of the Act. Having served the notice within the prescribed time, the Income-tax Officer may thereafter proceed to assess (or reassess) the income, profits or gains, and the provisions of the Act shall, so far as may be, apply accordingly as if the notice were a notice issued under S. 22 (2). Thus in any assessment proceedings under S. 34, after the service within time of the initial notice calling for the return, the Income-tax Officer has power to do all or any of the things that he is empowered to do in any original assessment proceedings initiated by the service of a notice under S. 22 and not under S. 34.

8. When an assessment proceeding is started within time under S. 22 (2) all that can be expected of the Income-tax Officer is that he should have reason to believe that the income of the person to whom the notice calling for the return is addressed is such as to render him liable to income-tax. Similarly when an assessment proceeding is started within time under S. 34 the Income-tax Officer is expected to act in the belief that the person's income has wholly or partly escaped assessment or been assessed at too low a rate. The Income-tax Officer cannot, in the nature of things, be in possession of all the facts pertaining to the assessee's income or the extent to which it has escaped assessment. After the service of the notice under S. 22 (2) or S. 34 as the case may be, the Act provides that the Income-tax Officer should proceed to

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determine the person's income and for this purpose he has power to call for accounts under S. 22 (4), and where a return has been made which the Income-tax Officer believes to be incorrect or incomplete, to hear such evidence as the person may produce and such other evidence as the Income-tax Officer may require—*vide* Ss. 23 (2) and 23 (3).

9. In the final determination of the income the Income-tax Officer shall proceed under S. 23 (3) or, if any of the defaults described in S. 23 (4) has been committed, under that sub-section. An assessment under S. 23 (3) must be made after hearing evidence and under S. 23 (4) to the best of the Income-tax Officer's judgment. In either case the Income-tax Officer must take notice of facts which come to his knowledge relevant to the nature and quantum of the person's income. These facts may well be facts brought to the knowledge of the Income-tax Officer by the assessee himself, and in all cases where the assessment is based on accounts the facts relied on by the Income-tax Officer are only those supplied by the assessee. Such facts obviously can come to the Income-tax Officer's knowledge only after the assessment proceedings have been started, and as no time-limit is laid down in the Act within which an assessment including an assessment under S. 34 must be completed these facts may be furnished by the assessee even after the year to which the assessment relates or the year within which the assessment proceedings had to be commenced. When facts relevant to an assessment proceeding are produced by an assessee before the Income-tax Officer in the course of that proceeding the assessee has the right to demand that the Income-tax Officer shall take cognizance of those facts. It would be stultifying the statutory requirements of S. 23 (3) of the Act if he were to put such facts out of consideration. No time-limit having been prescribed for the completion of assessments the only answer that can be given to the question propounded is that if facts that come to the Income-tax Officer's knowledge after the period of one year but before the assessment or re-assessment is completed afford evidence in respect of the assessee's income the Income-tax Officer can make use of them for the purpose of completing the assessment or re-assessment. I venture to submit that when it is open to an Income-tax Officer to make use of facts supplied by the assessee right up to the time that the assessment proceedings are completed it must be equally open to him to make use of facts which he learns from others and not from the assessee before the completion of the assessment.

The question should be answered accordingly.

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K. Rajah Aiyar and *R. Sundaralingam* for Petitioner.

M. Patanjali Sastri for Respondent.

The judgment of the Court was delivered by

The Chief Justice.—On the 18th November, 1932, E.M. Viswanatham Chettiar was assessed to income-tax on an income of Rs. 8,277 in respect of the Tamil year ended 12th April, 1932. The assessee was the managing member of an undivided Hindu family. The family carried on a money-lending business at Puduvayal in British India, in the Federated Malay States, and in Burma. The year of assessment closed on the 12th April, 1933 and on the 13th December, 1933, the Income-tax Officer having reason to believe that income earned during the accounting period had escaped assessment issued a notice under S. 34 of the Indian Income-tax Act. On the 6th October, 1934, the assessee filed a statement to the effect that that no income had escaped assessment. On the 25th February, 1935, the Income-tax Officer issued a notice to the assessee under S. 23 (2) to produce the evidence on which he proposed to rely. On the 18th July, 1936, the Income-tax Officer gave the assessee notice that on the 24th of that month he would commence an inquiry into the question of what income had escaped assessment and directed him to appear before him with all his account books and pass books. The inquiry in fact actually commenced on the 23rd July, and continued on the 28th and the 29th when it was completed. On the 30th July, 1936, the Income-tax Officer re-assessed the assessee on an income of Rs. 55,000 which included the Rs. 8,277 already assessed.

The reasons for the delay which took place after the issue of the notice under S. 34 on the 13th December, 1933, are apparent from the facts set out in the statement made by the Commissioner of Income-tax in making the reference now before us. Inquiries had to be made in Burma and there was lengthy correspondence with the Income-tax officials in that country. It is clear that income which should have been assessed in the year of assessment did escape assessment. The assessee, however, contended before the Commissioner of Income-tax that the Income-tax Officer had no right in making the further assessment to take into consideration information which he had received after the expiration of one year from

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the end of the year of assessment. The Commissioner was asked to state a case on this point, but as he refused, the assessee applied to this Court and the Commissioner was directed to refer the following question:—

"Where the Income-tax Officer has issued a notice under S. 34, can he, for the purpose of assessing income, which has escaped assessment rely on facts which come to his knowledge after one year from the end of the year of assessment?"

As in our view the assessee wishes us to read into S. 34, something which is not there I will set it out in full:—

"If for any reason income, profits or gains chargeable to income-tax has escaped assessment in any year or has been assessed at too low a rate, the Income-tax Officer may, at any time within one year or the end of that year, serve on the person liable to pay tax on such income, profits or gains, or, in the case of a company, on the principal officer thereof, a notice containing all or any of the requirements which may be included in a notice under sub-S. (2) of S. 22 and may proceed to assess or re-assess such income, profits or gains, and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that sub-section:

Provided that the tax shall be charged at the rate at which it would have been charged had the income, profits or gains not escaped assessment or full assessment, as the case may be."

It will be seen that all that the section says is that if for any reason income chargeable to income-tax has escaped assessment in any year or has been assessed at too low a rate the Income-tax Officer may within the time specified serve on the assessee the contemplated notice, and after having done so proceed to assess or re-assess such income. There is nothing in the section which indicates that the inquiry is to be limited in time.

The decision of the Privy Council in the case of *Rajendra Nath Mukerjee* v. *Commissioner of Income-tax, Bengal*1, has bearing on the question now before us. The assessees in that case were partners in a firm. After the year of assessment had expired but before the final assessment was made the Income-tax Officer discovered profits which had not been returned, and at a period considerably later than the end of the financial year made an assessment based on what he had discovered after its close. The appellants submitted that on a true construction of the Act an assessment must be completed within the year of assessment and if it was not, the only remedy open to the Income-tax authorities was that provided by S. 34. Their

1. (1933) 66 M.L.J. 121: L.R. 61 I.A. 10: I.L.R. 61 Cal. 285 (P.C.).

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Lordships held that there was no limitation to the time in which the final assessment could be made and that as proceedings for the assessment of the assessee's income for a financial year were pending and no final assessment had been made there was no question of income having escaped assessment within the meaning of S. 34 so as to make the service of a notice within one year of the end of the year as therein required a condition of assessment.

In the present case the notice required by S. 34 was given within the period allowed and it was the duty of the Income-tax Officer to ascertain what income had in fact escaped assessment. The assessment was reopened so far as such income was concerned. To say that the Income-tax Officer shall be limited to facts discovered within a year of the year of assessment is to say something which the section does not say and if acted upon would defeat the object of the section. We have no hesitation in answering the reference in the affirmative.

The reference having been decided against the assessee he will pay the costs, Rs. 250.

K.C. ——— *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

Minor Minakshi Aiyar by next friends .. *Appellant* in both (Petitioner and 1st Respondent)*

v.

Noor Muhammad Rowther and others .. *Respondents in A.A.O. No. 420 of 1935 (Respondents Nos. 1, 2 and 6 to 12 and Party newly added).*

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Execution—Executing Court—Powers of—Plea of benami*—Jurisdiction to inquire into.*

It cannot be laid down as a universal rule that it is not open to a Court in execution to inquire into questions of *benami* title and adjust the rights of parties according to its findings. It may be a sound policy to discourage *benami* transactions in general; but unless statutorily bound, the Court continues to do its duty of unravelling the truth, however cleverly hidden by false or fictitious trappings, and administer justice according to the true rights of the parties such as they may be found to be on inquiry.

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*A. A. O. Nos. 420 and 421 of 1935. 2nd September, 1938.

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Appeals against the order of the Court of the Subordinate Judge of Kumbakonam dated 8th August, 1935 and made respectively in E. P. No. 172 of 1929 and E.A. No. 163 of 1930 in O. S. No. 32 of 1925 (Sub-Court, Ramnad).

S. Panchapagesa Sastri and *R. Krishnaswami Aiyangar* for Appellant in both.

A. Sundaresan and *S. Hanumantha Rao* for Respondents in both.

Krishnaswami Aiyangar, J.

The judgment of the Court was delivered by

Krishnaswami Aiyangar, J.—The disputes which have given rise to these appeals relate to a fund in Court standing to the credit of O. S. No. 33 of 1924 on the file of the Sub-Court, Kumbakonam. It is a sum of Rs. 2,983-2-6 representing the value of the share of one Adamsa Rowther in a rice mill situated in Pandaravadai village. Adamsa died in 1919 involved in debts, but he had left considerable properties in and round Pandaravadai. He appears to have carried on a business in Saramban in the F. M. S., which was after his death taken over by his son-in-law, Abdul Rahiman, and continued by him. Kadir Bacha was a brother of Adamsa who has figured prominently in the arrangements made by Adamsa's heirs for the discharge of his debts. These heirs, were Noor Muhammad and Muhammad Ibrahim his sons, Mohideen Bivi a daughter, and Zuleka Bivi his second wife. A major portion of his properties was transferred by them to their uncle Kadir Bacha on 28th May, 1922, by a deed which shows that except for a comparatively small amount, the consideration of Rs. 35,000 was the undertaking by the transferee to pay and discharge the debts of the deceased. There were also certain other transfers by the heirs, but for the purpose of these appeals it will be sufficient if we refer in particular to the one on 5th August, 1923, of Adamsa's interest in the rice mill to his son-in-law Abdul Rahim. It may at once be mentioned that this transfer is attacked by the appellant in C.M.A. No. 420 of 1935 as a nominal one, not intended to pass title to the property, but was brought about solely for the purpose of screening it from the creditors and for the secret benefit by the heirs.

At the time of this transfer there were admittedly disputes regarding the rice mill, Adamsa's heirs claiming his half share, his partner Mandia Esumsa vigorously denying it. After his

purchase, steps were apparently taken by Abdul Rahim to assert his rights against Esumsa, and they resulted in criminal proceedings between the parties which were finally settled by a reference to arbitration. An award was passed on 9th December, 1923, by which Esumsa and his son were directed to pay a sum of Rs. 3,000 and odd to Abdul Rahim. This amount was however not paid, and it therefore became necessary for Abdul Rahim to institute O. S. No. 33 of 1924 for the recovery of the money. While the suit was pending Mohideen Bivi his wife died and thereafter the feelings between him and her brothers became strained, so much so that Noor Muhammad felt it necessary to institute criminal proceedings against Abdul Rahim. These proceedings, it is clear from the complaint QQ, had reference to a claim against Abdul Rahim due to a withholding by him of certain valuable securities appertaining to Adamsa's estate including a business letter relating to a rice mill in India which was obviously none other than the mill at Pandaravadai. A settlement was ultimately arrived at on 16th March, 1927, evidenced by a writing Ex. PP signed by Abdul Rahim, Noor Muhammad and Kadir Bacha. By it Abdul Rahim undertook to pay Rs. 1,000, and 50 to Noor Muhammad in full settlement of the pronote and dealings of Adamsa and to give a transfer of the rice mill in favour of Kadar Bacha, who was at this date on terms of cordiality with Noor Muhammad. In pursuance of this compromise, Abdul Rahim executed the transfer on 17th March, 1927, conveying his interest in the rice mill then under litigation in O. S. No. 33 of 1924, for an alleged consideration of Rs. 3,000. Thereupon, Kadir Bacha brought himself on the record in place of Abdul Rahim, and finally obtained a decree by consent for a sum of Rs. 2,900, against which a sum of Rs. 2,983-2-6 has been deposited into Court on 29th October, 1929, by the judgment-debtors but not before the issue of process in execution. As we have said the true ownership of this fund is the question that has to be decided in the appeals. Kadir Bacha having died on 29th November, 1929, his heirs claimed payment to themselves. This claim is opposed by Minakshi Aiyar who is the appellant in C. M. A. No. 420 of 1925.

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Krishnaswami Aiyangar, J.

Minakshi Aiyar's claim arises out of an attachment of the identical fund in execution of the decree obtained by him in O. S. No. 32 of 1925, on the file of the Sub-Court of Ramnad.

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This suit was one filed by his father Ayyavu Aiyar for the recovery of a sum of Rs. 16,000 or thereabouts due on dealings between him and the deceased Adamsa. The heirs of Adamsa as also his brother Kadir Bacha were joined as defendants the claim so far as the latter was concerned being based on his undertaking to pay a sum of Rs. 5,500 to Ayyavu Aiyar, contained in the sale deed of 28th May, 1922, already referred to. On the death of Ayyavu Aiyar pending the suit, Minakshi Aiyar his minor son, was substituted in his place. On 10th September, 1927, a decree for Rs. 16,369-5-6 was passed against the heirs of Adamsa; and for a portion of it, namely, for Rs. 7,788-14-0, Kadir Bacha was made liable. Kadir Bacha discharged his liability by payment of a sum of Rs. 9,945-14-0 into Court, part of the sale proceeds of a property which he had purchased from Adamsa's heirs as already mentioned. There still remained a balance of over Rs. 11,000 to be realised, and execution of the decree had therefore to be taken out. There was first a transmission of the decree to the Tanjore Sub-Court, and later the decree was transferred to the Sub-Court, Kumbakonam, the very Court which held in its custody though to the credit of a different suit, namely, O. S. No. 33 of 1924, the sum of Rs. 2,983-2-6 referred to above. E. P. No. 172 of 1929 is the execution petition of Minakshi Aiyar, seeking attachment and payment out of the money as being an asset of Adamsa on the allegation that the transfer first to Abdul Rahim and afterwards to Kadir Bacha was not supported by consideration and was but an attempt by Noor Muhammad and the other heirs of Adamsa to keep the property in the names of relations, so as to evade the creditors, and secure it for themselves after the disputes were over. An attachment was accordingly made on 9th October, 1929. The opposing claimants were the legal representatives of Kadir Bacha—he seems to have died on 29th November, 1929—who filed E. A. No. 163 of 1930 contesting the attachment on the ground that the fund in Court absolutely belonged to them and not to Adamsa's heirs who had according to them no interest whatever in it. The Sub-Judge who heard both the petitions together has dismissed E. P. No. 172 of 1929 and allowed E. A. No. 163 of 1930 holding that both the transfers the first to Abdul Rahim, and the second in favour of Kadir Bacha, were real and not merely colourable transactions, and that the money

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truly belonged to Kadir Bacha, and after his death to his heirs who have since sold their right to one Dawood Mohideen. Minakshi Aiyar the decree-holder has preferred these appeals C. M. A. Nos. 420 and 421 of 1935 against the said order.

This is a somewhat long narrative, but it is necessary to set it out in order to understand the nature of the dispute. It will be seen that the lower Court as the custody Court held the fund to the credit of O. S. No. 33 of 1932 and was at the same time moved to execute the decree in O. S. No. 32 of 1925 passed by the Ramnad Sub-Court but transmitted to it for execution. A preliminary objection to the maintainability of these appeals was taken by the respondents' learned Advocate. The argument if we followed it rightly was this. Under O. 21, r. 52, Civil Procedure Code, any question of title or priority between the decree-holder and any other person not being the judgment-debtor claiming to be interested in the attached property by virtue of any assignment, attachment or otherwise has to be determined by the custody Court. It was said that the Kumbakonam Sub-Court which was the custody Court had no doubt jurisdiction to determine the question but it could do so only in O. S. No. 33 of 1924 in which the money was realised and brought into Court, and not in O. S. No. 32 of 1925 in which the appellant was seeking execution. Even if the Court purports to have dealt with it in O. S. No. 32 of 1925 it must be deemed to have done so only in O. S. No. 33 of 1924 as it is in respect of that suit alone the Court can be regarded as the custody Court. Proceeding on this footing it was next urged that the order under appeal must be deemed to have been made in O. S. No. 33 of 1924, a suit to which neither Minakshi Aiyar nor his father Ayyavu Aiyar was a party, for the purpose of S. 47, Civil Procedure Code and, not being a party he had no right of appeal under that section, nor under O. 43, r. 1, which contains no provision for an appeal in favour of a stranger such as Minakshi Aiyar was. We are clear that there is no substance in this objection. The order in question was one undoubtedly made in O. S. No. 32 of 1925 as the cause title to it plainly shows, and was at any rate allowed to be so made without any objection by the respondents. It is now too late to permit such a purely technical objection to be raised. We may also observe that all that the rule directs is that the custody Court should be the Court to determine the dispute and

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the lower Court had, in our opinion, sufficient jurisdiction as it had the fund in its custody. We see no warrant in the Code, for holding that the dispute must be or must be deemed to have been dealt with and determined only in the one suit rather in the other, so long as it is the custody Court that has enquired into it. We are accordingly of opinion that under S. 47, Civil Procedure Code, which we hold is applicable to this case, the appellant has a right of appeal, and overrule the preliminary objection.

Coming now to the merits, it is necessary before entering on a discussion of the facts to advert to a point of law which has found favour with the learned Subordinate Judge. He has held that an executing Court cannot, having regard to the ruling in *Palaniappa Chettiar* v. *Subramania Chettiar*[1], go into the question whether the fund in Court really belonged to Adamsa's heirs and only stood *benami* in the name of Kadir Bacha. According to him the person whose name appears as the decree-holder must be held to be the person really entitled to the fruits of the decree and whatever claims Adamsa's heirs or creditors may have against Kadir Bacha in other proceedings, in execution proceedings the plea of *benami* cannot be accepted. He therefore came to the conclusion that it was Kadir Bacha's heirs who were entitled to draw the amount in Court. After carefully considering the decision reported in *Palaniappa Chettiar* v. *Subramania Chettiar*[1] and O. 21, r. 16 of the Civil Procedure Code on a construction of which, it is based, we are unable to agree with the view taken by the learned Subordinate Judge. It may be sound policy to discourage *benami* transactions in general tending as they very often do, to the effective concealment of fraud to the embarrassment of Courts. But unless statutorily bound, the Court must continue to do its duty of unravelling the truth however cleverly hidden by false or fictitious trappings, and administer justice according to the true rights of parties such as they may be found to be on enquiry. It may again be a desirable end to thwart the attempt frequently made by unscrupulous debtors to throw obstacles in the way of a successful litigant realising the fruits of his decree, and prevent the Court from being side-tracked into a long and tedious enquiry having the effect of delaying or

1. (1924) 48 M.L.J. 419: I.L.R. 48 Mad. 553.

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defeating a *bona fide* decree-holder. Even if such were the obvious purpose of the obstruction, the Court must still do its duty by holding the enquiry and get at the truth, subject no doubt to such rules of procedure as the legislature has laid down. In the present instance, we find nothing in the language of O. 21, r. 16, lending support to the view that the Subordinate Judge has taken. By that rule the transferee of a decree by assignment in writing or by operation of law is entitled to apply for execution of the decree subject to the conditions mentioned in the section. The question may arise by way of a corollary, and did arise in *Palaniappa Chettiar* v. *Subramania Chettiar*[1], whether any person other than the transferee can apply under the section. In that case a person who claimed to be the real owner of a decree which had been, it was found at his instance, transferred to his agent, made the application, and it was held that he had no right to make it, as O. 21, r. 16 did not give him the right. Srinivasa Aiyangar, J., observed:

"It seems to me that O. 21, r. 16 is perfectly clear on the point. It speaks of the decree being transferred by assignment in writing or by operation of law, and provides that in such cases the transferee may apply for execution. When the statute speaks of 'an assignment in writing' and 'the transferee' the proper construction of the words would necessitate our holding that the transferee referred to is the transferee named as such in the assignment in writing. To hold otherwise would be not to give proper effect to the words of the statute."

As explained by the learned Judge the decision purports merely to give effect to a principle implicit in the language of the rule which in terms recognises a right in the transferee only to apply for execution and it was held that he alone and none other, whatever his true position or right may be, that could take advantage of the rule for the purposes of execution. With that proposition we are inclined respectfully to agree, but we must however express our dissent to certain other observations which occur at pp. 558 and 559 of the report if by them the learned Judge intended to lay down as a universal rule that it is not open to the Court in execution to enquire into questions of *benami*, and adjust the rights of parties according to its findings. The observations are these:

"It is also clear that the Civil Procedure Code did really intend to prevent *benamidars* coming in and making applications to the Court on the general basis of the law relating to *benami* transactions. . . . It would lead to very serious consequences if we should allow the law of *benami* to

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have any operation with regard to suits and proceedings and records of Court and if only on that ground, it would be desirable to disallow any such contention."

The language here employed is very wide, suggesting as it does that it would be proper to ignore a plea of *benami* if it tends to affect suits, proceedings and records of Court. The facts of the case itself did not, so far as we could see, call for such a sweeping observation and we are unable with the utmost respect, to treat it as any better than an *obiter dictum*. The learned Judge himself in this connection refers in support of the proposition, only to S. 66, Civil Procedure Code, which in terms limits the prohibition to an attack on the title of the person claiming title under a purchase certified by the Court, and expressly saves the right of a third person to proceed against the property ostensibly sold to the certified purchaser if in fact and in truth it is liable to satisfy a claim of such third person against the real owner. We cannot see any warrant in the provisions of the Code for enlarging the prohibition so as to cover suits and proceedings or the records of Court in general. To do so would result in many cases in the promotion and not in the suppression of fraud. Provisions of this character restrictive as they are of the rights of parties and the jurisdiction of the Courts, should, we think, be strictly construed, and ought not to be extended beyond the plain language of the rule. In this connection it would be apposite to quote the observations of the Privy Council in *Mussumat Buhuns Kowur* v. *Lalla Buhooree Lall*[1]:

"It is well known that *benami* purchases are common in India, and that effect is given to them by the Courts according to the real intention of the parties. The legislature has not, by any general measure, declared such transactions to be illegal; and therefore, they must still be recognised and effect given to them by the Courts except so far as positive enactment stands in the way, and direct a contrary course."

After referring to the enactment contained in S. 260 of the Code of 1859 corresponding to S. 66 of the present Code, and stating that it was clear and definite and was confined to a suit against the certified purchaser their Lordships went on to say:

"The present suit which is the converse of that pointed at in the section, is not within the words or scope of it."

"It would be especially unsafe so to construe the Act as by inference to import into it a prohibitory enactment which would exclude any enquiry into the truth in any suit between the parties"

1. (1872) 14 M.I.A. 496.

Though their Lordships were dealing with a suit, we think there can be no difference in the principle to be applied whether it is a suit, or an execution proceeding, and we accordingly hold that there is no legally valid objection to an enquiry into the merits of the present case.

Coming to the facts, the transfer by Adamsa's heirs to Abdul Rahim is evidenced by Ex. A, and the one by Abdul Rahim to Kadar Bacha by Ex. III. As we have already said Adamsa died in 1919 in embarrassed circumstances though he left considerable properties. Kadar Bacha the brother, and Abdul Rahim the son-in-law were among the persons who would obviously take an interest in winding up the affairs of the deceased and help the heirs to make the necessary arrangements. Both of them were and have been on terms of the utmost cordiality with Noor Muhammad the eldest son who in his turn would naturally look up to them for help and guidance. It is true that there were differences between him and Abdul Rahim in 1927, but the nature of the disputes as disclosed in the complaint Ex. QQ and in settlement PP only emphasises the degree of confidence that previously existed between them. In 1922 sale-deeds of parcels of Adamsa's properties seem to have been executed. The most important among them was Ex. B the transfer in favour of Kadar Bacha comprising the major portion, as we have already said, of the properties of Adamsa; but the rice mill was not among the items included. That was due very probably to the fact that the other partner Esumsa was, though improperly, disputing the claims of the heirs. If therefore they were minded to save something for themselves out of the wreck, it is not improbable that Kadar Bacha and Abdul Rahim would readily lend themselves to such a scheme. While this circumstance cannot be ignored, it is by itself in our opinion of little value as a basis for a decision. The learned Sub-Judge has found that Ex. A is supported by consideration, though that finding is expressed in terms which suggest that it was not an absolute one but given only for the purposes of the proceedings before him. However that may be, we are unable to share his view on this point, in view of the circumstances to which we shall presently advert. It is unfortunate that the learned Judge failed to pay sufficient attention to what we consider to be the most material evidence in the case, namely, the evidence afforded by the account books

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maintained by Kadar Bacha and by the conduct of the parties concerned.

The consideration for Ex. A was Rs. 2,000 according to the recital in it, out of which Rs. 700 is said to have been in cash, the balance having been previously paid for discharging the balance of the debts due to (1) Vidwan Rajagopalachariar, (2) Chidambaram Chettiar, and (3) Govindaswami Chetti. By Ex. B dated 28th May, 1922, provision had already been made for payment of these debts, among others, by Kadar Bacha the purchaser undertaking out of the consideration payable for the sale, to discharge them. It is argued for the appellant that the recitals of consideration in Ex. A are all false, made with a view to lend a colour of reality to a purely fictitious and sham transaction. There is force in the argument, for we find from the evidence that neither Abdul Rahim the alleged purchaser nor Noor Muhammad or any of his co-heirs appear to have made any of the payments which discharged these debts. As regards the first of these debts it was Ibrahimsa the purchaser of a portion of the land conveyed to Kadar Bacha under Ex. B that paid Rs. 3,000, and Kadar Bacha himself the balance of Rs. 20, both payments being endorsed on the document on 10th November, 1922. For the second of the debts, it was Kadar Bacha who paid the whole of it on 19th June, 1923. It is not quite clear who made the payment in respect of the third defendant, though there is the evidence of the creditor's clerk to the effect that Noor Muhammad and Abdul Rahim made it. This evidence we hesitate to accept as it is based merely on memory, uncorroborated by the entries in the account books of the creditor. Abdul Rahim between whom and Noor Muhammad the old friendly relationship seems to have been re-established has no doubt sworn that he did pay to Noor Muhammad Rs. 1,300 in instalments prior to Ex. A and Rs. 700 in cash on the date of the document. He has deposed that he brought Rs. 2,000 from the F.M.S. when he came to his village about the time of the transaction but had to admit that he kept accounts which would show it but which he did not produce. In the absence of his account books which would afford the best evidence on the point we think it would be unsafe to act on the uncorroborated testimony of this witness who is obviously interested in supporting his brother-in-law Noor Muhammad. Noor Muhammad himself was kept out of the box, and it is apparent that he did not like

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to face cross-examination on several matters to which he has been a party, and for which he alone could give a satisfactory explanation. Dawood Sa an attestor of Ex. A, speaks to Noor Muhammad's admission of the receipt of the consideration, but he was a working partner and clerk of Kadar Bacha who if the appellant's case is true was in the conspiracy with Noor Muhammad. To the same effect is the evidence given by another attesting witness who is a brother-in-law of Abdur Rahim. Neither of these two persons can be regarded as independent witnesses not subject to the influence of Abdul Rahim or Kadar Bacha. On this evidence it cannot be said that consideration for Ex. A has been made out, and we must accordingly differ from the learned Sub-Judge on this point. The learned Judge also says that there is nothing to indicate that the payments were made from out of the estate of Adamsa. But the more important circumstance is that Abdul Rahim is not shown to have paid. If Kadar Bacha or Noor Muhammad paid the money why did they, instead of Abdul Rahim, do so? What interest had they at the time? If we remember that the assets of Adamsa were with Noor Muhammad or Kadar Bacha and that Kadar Bacha, very likely, took over the property not for the purpose of owning it for himself, but for the purpose of putting the affairs of Adamsa in order by paying his debts, there is nothing unreasonable in the argument that the consideration really came from Adamsa's estate. We are unable to follow the argument of the learned Judge that because Adamsa was in involved circumstances, no payment could have been made by his heirs or from his considerable estate.

The learned Judge is of opinion that it has not been satisfactorily explained why this *benami* or fraudulent transaction had been made; and has said that because a man was in involved circumstances it did not follow that he could not execute any sale deeds. We think that these observations are unsound and irrelevant. For, the purpose of the transaction, is not difficult to find. It was none other than to defeat the appellant who was a creditor entitled to recover a large sum of money, to the knowledge of all the parties concerned, and this is indeed the appellant's case. Abdul Rahim himself made the somewhat significant admission in his evidence, namely, "Noor Muhammad told me that he owed large debts and that attempts

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were being made to sue him and attach the properties and asked me to purchase the mill."

If in these circumstances he took the property without paying any consideration for it, the inference is too obvious to require any further explanation. Further a person in involved circumstances may legitimately sell his property if he acts *bona fide* but if his object is to defeat his creditors the sale is liable to be set aside for the benefit of the creditors.

As regards Ex. III, we may observe that it was executed while O.S. No. 32 of 1925 was pending, in pursuance of the arrangement evidenced by Ex. PP to which we have already referred. This was an adjustment of the disputes between Noor Muhammad and Abdul Rahim in regard to what formed a part of Adamsa's estate. The settlement was we think that Noor Muhammad should have it back for himself. Kadar Bacha, Noor Muhammad and Abdul Rahim were all at Saramban in the F.M.S. at the time, and Kadar Bacha was espousing the cause of Noor Muhammad against Abdul Rahim, as is evident from QQ the criminal complaint from which it is apparent that Noor Muhammad had been acting in close consultation with Kadar Bacha. He was also a signatory to the settlement deed itself. Further there was no occasion or need at the time for Abdul Rahim to make a sale of the mill to Kadar Bacha and none is even hinted at in Ex. PP. It only speaks of a transfer to be made in favour of Kadar Bacha. On the very next day the transfer Ex. III was executed with recitals of consideration making it appear that it was a sale for Rs. 3,000. It is very unlikely that Kadar Bacha had any money in his hands, and much more unlikely that he would have desired to invest such a large sum of money on a property under litigation. It is unfortunate that the evidence of neither Kadar Bacha nor of Noor Muhammad is available, as the one died before the trial and the other purposely kept out of the witness box. They are the persons whose evidence would be most valuable for a decision of the case. We think however that whatever doubts there may still be in the appellants' case are all dispelled by the account books of Kadar Bacha which furnish cogent and almost conclusive evidence of the true nature of the transaction. In these books there are various credits and debits to an account opened in the name of Noor Muhammad and covering the period between July, 1922, and April, 1929. The

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entries relate to the receipt of rents from the lands conveyed under Ex. B, to the price realised by sale of a portion of these lands by Kadar Bacha under Ex. N on 12th December, 1927, and to the payment into Court in O.S. No. 32 of 1925 of Rs. 9,945-14-0 in discharge of his liability under the decree. Except on the footing that in spite of Ex. B, Noor Muhammad continued to be the owner, it is impossible to understand these entries. What is still more remarkable, is the existence of entries in the books showing that right from the beginning, from August, 1923, onwards, expenses incurred in connection with O.S. No. 33 of 1924 were all debited to Noor Muhammad and this system continues even after the so-called purchase by Kadar Bacha in March, 1927. The inwardness of the two transactions Exs. A and III plainly appears from these accounts. They unmistakably point to the fact that neither Abdul Rahim nor Kadar Bacha was the real owner and that the real owner was no other than Noor Muhammad. It was on this footing that the parties appear to have dealt with each other as between themselves whatever blinds they thought it expedient to adopt towards the outside world in general and the creditors in particular. It is impossible to get rid of the effect of the entries in the accounts by saying that they merely throw some doubt on the nature of Exs. A and III, or finding in spite of them that consideration must be held to have passed and so they must be held as genuine transactions. The criticism that these documents were not challenged by the appellant or his father in O.S. No. 32 of 1925, is meaningless; for, in a money suit such as it was, no occasion could arise for impugning them till after decree. Nor can we see any point in the observation that Kadar Bacha would not have taken a sham or colourable transfer during the pendency of the suit when the heirs of Adamsa were also parties to it. Kadar Bacha was a close relation in whom Adamsa's heirs had implicit trust, and it would have been by no means easy to find another person who would be a willing instrument for effectuating the fraud and at the same time be loyal enough not to take advantage of it for his own benefit later. Differing from the learned Sub-Judge we hold that both Exs. A and III represent *benami* transactions brought about for the purpose of helping Noor Muhammad and the other heirs to retain for themselves the value of the property seemingly conveyed under them and that the decree-

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holder in O.S. No. 32 of 1925 is entitled to obtain satisfaction out of the fund in Court standing to the credit of O.S. No. 33 of 1924. We accordingly accept both the appeals, allowing E. P. No. 172 of 1929, and dismissing E.A. No. 163 of 1930 with costs here and in Court below, one set in C. M. A. No. 420 of 1935. The costs paid by the appellant to the Court guardian for fees and purchase of printed papers will be included.

K.C. —— *Appeals allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Munusami Chetti and others .. *Appellants** (*Defendants*)

v.

Periya Kuppusami Chetti and others .. *Respondents* (*Plaintiffs*).

Munusami Chetti v. Kuppusami Chetti.

Civil Procedure Code (V of 1908), S. 91—Member of public bringing action—Action to remove obstruction to public way—Right to frame a suit without sanction of Advocate-General and special proof of damage—Application of English rule to India, how far.

On the question whether the plaintiffs could maintain a suit for establishing a public right of way and removal of an obstruction which constituted a public nuisance, without the sanction of the Advocate-General under S. 91 of the Civil Procedure Code and without proof of special damage,

Held, that there could be no objection to the framing of such an action.

The decision of the Privy Council in *Mansur Hasan* v. *Muhammad Zaman*, (1924) 48 M.L.J. 23: L.R. 52 I.A 61: I.L.R. 47 All. 151 (P.C), must be taken to have established that the English rule requiring proof of special damage in cases in which a member of the public prayed for the removal of an obstruction to a public way does not apply to India.

Appeal against the decree of the District Court of North Arcot at Vellore in A. S. No. 86 of 1934 preferred against the decree of the Court of the District Munsif of Arni in O. S. No. 480 of 1932.

M. Patanjali Sastri for Appellants.

M. S. Rathnasabapathy Mudaliar for Respondents.

The Court delivered the following

JUDGMENT.—The plaintiffs sued for a declaration that there was a public path running between the house belonging to the third plaintiff and the house belonging to the defendants and for an injunction requiring the defendants to remove the wall obstructing this alleged path. The trial Court found that, though there was no proof of a public path, there was a path

* S. A. No. 1158 of 1934 9th December, 1938.

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common to the third plaintiff and the defendants measuring 3½ feet in width and granted a declaration and injunction accordingly. The learned District Judge on an appeal by the plaintiffs held that there was a public path, that it was 8 feet in width and that there was no objection to the frame of the suit. Defendants therefore appeal.

The main question in appeal is whether the plaintiffs can maintain the suit for establishing a public right of way and removal of an obstruction which constituted a public nuisance, without the sanction of the Advocate-General under S. 91 of the Code of Civil Procedure and without proof of special damage. Undoubtedly, according to the view held by this Court in the past, such a suit would not lie. I have been referred to the rulings in *Hussain Sahib* v. *Narasimhappa*[1] and *Kandasami Kovundan* v. *Karupanna Kovundan*[2] and admittedly there are many other decisions to the same effect. These decisions, however, are prior to the decision of the Privy Council in *Manzur Hasan* v. *Muhammad Zaman*[3]. The Privy Council were actually dealing with the case of a right to go in procession without interference, but in discussing the right to file a suit for declaration of such a right without proof of special damage, their Lordships consider the case of *Satku valad Kadir Sausare* v. *Ibrahim Aga valad Mirza Aga*[4], where the English rule, that plaintiffs could not maintain a suit in respect of an obstruction to a highway unless they proved some damage to themselves personally in addition to the general inconvenience occasioned to the public, has been adopted. Their Lordships point out that the judgment in the Bombay case proceeds entirely on English authorities which lay down the difference between proceedings by indictment and by civil action. They point out that such a way of deciding the case was inadmissible and that the distinction between indictments and actions in regard to what is done on a highway is a distinction peculiar to English law and ought not to be applied in India. Now, this decision has been considered in at least two cases of other High Courts expressly dealing with the right to sue for removal of an obstruction in a public way. One is that of the Calcutta High Court, *Mandakinee Debee* v. *Basantakumaree Debee*[5],

1. (1912) 23 M.L.J. 539.
2. (1913) M.W.N. 1001.
3. (1924) 48 M.L.J. 23: L.R. 52 I.A 61: I.L.R 47 All. 151 (P.C.).
4. (1877) I.L.R. 2 Bom. 457.
5. (1933) I.L.R. 60 Cal. 1003.

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where Jack, J., held that an individual member of the public could sue for the removal of an obstruction of a public way if it affected him personally, without proof of special damage. He also found on the facts of that case that there was special damage and Mallik, J., agreed with the finding of special damage and did not consider the effect of the Privy Council decision as to the general right of suit. Another case on the same lines is *Municipal Committee, Delhi* v. *Mohammad Ibrahim*[1], where the learned Chief Justice and Din Mohammad, J., observe that the principle of English law requiring proof of special damage in the case of a suit by an individual member of the public to remove an obstruction from a public way does not apply to India. The learned Judges follow the decisions in *Mansur Hasan* v. *Muhammad Zaman*[2] and *Mandakinee Debee* v. *Basantakumaree Debee*[3] above referred to. They also observe that the owners of houses abutting on the public highway in question which was obstructed have an actionable claim on the ground of the diminution of the amenities of those houses. To this extent it may be said that they put their decision both ways—both on the ground that a member of the public can bring such a suit without proof of special damage and on the view that in the special circumstances of the case there was a cause of action on the basis of damage to the property in the neighbourhood. There is no Madras case, so far as I am aware, in which the effect of the Privy Council decision in *Mansur Hasan* v. *Muhammad Zaman*[2] has been considered. There is one decision of a single Judge, Horwill, J., reported in *Appayya* v. *Narasimhalu*[4], which follows the older Madras cases and holds that special damage is necessary, but the learned Judge does not refer to the Privy Council decision or cases based upon it. Two other cases have been quoted before me *Paulad Maharaj* v. *Gauri Dutt*[5] and *Ardesar Jivanji* v. *Aimai Kuvarji*[6], in which a right of action has been recognised on the basis of the special interests of an adjoining proprietor, without reference to the question whether in view of the Privy Council decision in *Mansur Hasan* v. *Muhammad Zaman*[2], it is necessary to prove

1. (1934) I.L.R. 16 Lah. 517.
2. (1924) 48 M.L.J. 23: L.R. 52 I.A. 61: I.L.R. 47 All. 151 (P.C.).
3. (1933) I.L.R. 60 Cal. 1003
4. (1938) M.W.N. 262.
5. A.I.R. 1937 Pat. 620.
6. (1928) I.L.R. 53 Bom. 187.

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special damage. Mr. Patanjali Sastri for the appellants has endeavoured to maintain that the rule laid down by the Judicial Committee refers only to procession cases, that is to cases in which a man is endeavouring to establish a right to use a public way without interference and not to cases in which he is endeavouring to remove an obstruction from a public way on behalf of the general public; and he points out that according to the Madras decisions, even before the Privy Council decision, the former class of actions could be maintained without proof of special damage, whereas the latter class could not. As I read the judgment of the Privy Council, however, no such distinction is contemplated by their Lordships. They deal generally with the whole class of cases governing the rights of the public to use a public way. The case from the consideration of which the comment arose was one of actual obstruction, though the case which the Privy Council were themselves deciding was a case of a right to use a road without interference. I find it very difficult to see any difference in principle between the two classes of cases both governed by the same rule in England and if the English rule does not apply in one class of cases as the Privy Council has certainly held that it does not—I find it very difficult to see how it should be applied in the other class of cases. S. 91 of the Code of Civil Procedure, though it provides a remedy by getting the sanction of the Advocate-General—a remedy which in many of these cases will be financially out of reach of the parties—expressly safeguards any other remedies which may exist. It seems to me that the decision of the Privy Council in *Mansur Hasan* v. *Muhammad Zaman*[1] must be taken to have established that the English rule requiring proof of special damage in cases in which a member of the public prays for the removal of an obstruction to a public way does not apply to India. It seems to me to follow, therefore, that the decision of the District Judge is correct on this point.

I do not accept the alternative contention of the respondents that special damage was proved in the present case. The District Munsiff found it to have been proved on slender materials; the District Judge gives no finding at all. If this right of way is a public right of way, I do not see how the third plaintiff has been damnified any more than other members

1. (1924) 48 M.L.J. 23: L.R. 52 I.A. 61: I.L.R. 47 All. 151 (P.C.).

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of the public merely because the way runs by the side of his house.

It is urged by the appellants that the learned District Judge was wrong in deciding that the width of this path was 8 feet merely on the evidence of the Union Survey of which neither party appears to have had notice. So far as I am able to gather, there is no other evidence in support of this measurement and the title deeds of the parties indicate that the proper width of the path is 3½ feet only as found by the trial Court. While, in my opinion, the record of the Union Survey (though not conducted under the Survey and Boundaries Act) was admissible in evidence, I doubt very much whether the learned District Judge was justified in treating it as practically conclusive in the face of the measurements in the sale deeds and in the face of the fact that the plaintiff's witnesses themselves were unable to say what was the proper width of the path. We do not know on what materials this survey was made and clearly the most reliable criteria in a case of this kind are the measurements in the sale deeds.

In the result, therefore, the appeal will be allowed and the declaration and injunction given by the learned District Judge will be modified by the adoption of a width of '3½' feet in lieu of 8 feet for the public path which has been established. In the circumstances, both parties will bear their own costs in the second appeal.

Leave to appeal granted to the appellants.

K. C. —— *Appeal allowed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

PRESENT:—LORD MACMILLAN, LORD ROMER AND SIR GEORGE RANKIN.

P.C.

Corporation of Calcutta v. Moti Chand Chowdhury.

The Corporation of Calcutta .. *Appellants**

v.

Moti Chand Chowdhury and others .. *Respondents.*

Calcutta Municipal Act (Bengal Act III of 1923), S. 127—Principles of rating—Half ordinarily let half not ordinarily let—Building whether let as a whole—Correct method of valuation.

* P. C. Appeal No. 4 of 1938. Bengal Appeal No. 13 of 1937. 29th November, 1938.

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S. 127 of the Calcutta Municipal Act, 1923, prescribes in para. (a) the method of ascertaining the annual value for rating purposes "of any building erected, for letting purposes or ordinarily let", and in para. (b) the method of ascertaining the value "of any building not erected for letting purposes and not ordinarily let". The intention of that section is to classify all buildings as falling within one or the other of two mutually exclusive categories. The section treats each building as a unit of valuation, and the value of a building must be ascertained in conformity with one or other of the two prescribed methods. It cannot be valued as to one part by one method and as to another part by another method, because in that case the building, as a unit, could not be said to have been valued by either method since it would have been valued by both methods. The section does not provide for the case of a hybrid building part of which is ordinarily let and part of which is not.

Where a newly erected building was approximately as to half ordinarily let and as to the other half not ordinarily let,

Held that, the building must be valued in accordance with para. (b) of S. 127, and it was not therefore permissible to arrive at a valuation of the building by valuing one half of it under para. (a) and the other half under para. (b) of S. 127.

Of a building as to one half ordinarily let and as to one half not ordinarily let it cannot be predicated that it is ordinarily let, for only a part of it is ordinarily let. But it can be predicated of it that it is not ordinarily let if only a part is ordinarily let, for the whole of it is not ordinarily let. The test must be applied to every building as a whole. There may possibly be cases where the portion ordinarily or a portion not ordinarily let is so negligible in proportion to the whole of the building that the building might on the principle of *de minimis* be reasonably held as a matter of fact to be not ordinarily let or ordinarily let as the case may be.

Appeal from a decision of the High Court, Fort William, Bengal, dated 13th March, 1936 (Ghose and Guha, JJ.), affirming a decision of the Chief Judge of the Court of Small Causes, Calcutta, dated 23rd March, 1934, given on an appeal by the respondents, Moti Chand Chowdhury, Jamurta, Musammat Tulsa, and Musammat Gulab, against a valuation imposed on certain premises for rating purposes by the appellants, the Corporation of Calcutta, which was upheld on appeal by the Deputy Executive Officer.

The respondents were the owners of newly erected premises in Calcutta, and the appellants served on them a notice assessing the property for purposes of the consolidated rate under S. 124 of the Calcutta Municipal Act, 1923, at an annual value of Rs. 4,460. On objection to the Deputy Executive Officer, he reduced the valuation; but the respondents, being still dissatisfied, appealed to the Court of Small Causes which still further reduced the assessment. The Chief Judge of the Court of Small Causes, as the building was found by him to be roughly half in the occupation of the owners

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and half used for letting purposes, valued half of it under para. (*a*) of S. 127 and half under para. (*b*) of that section. The High Court upheld that method of valuation, and the Corporation now appealed to His Majesty.

Dunne, K.C. and *J. M. Pringle* for Appellants.—S. 3 (7) of the Calcutta Municipal Act in defining a "building" does not define it as including part of a building. The building in question is a self-contained unit of assessment and can only be split into two separate units of assessment as provided by S. 133, or by the Executive Officer in his discretion under S. 135 if he is asked to do so, which he was not. Para. (*b*) of S. 127 is a residual clause, so that any premises not falling within the description in para. (*a*) necessarily fall into para. (*b*). The paragraphs are mutually exclusive, and these premises, it is submitted, are clearly of a description which brings them within para. (*b*), and do not fall within the description in (*a*).

L. M. D. De Silva and *Wallach* for Respondents.—The High Court was entitled to proceed on the finding of fact of the Court of Small Causes that half the building was in the occupation of the owner and half ordinarily let. Counsel referred to the Rating and Valuation (Apportionment) Act, 1928 (18 & 19 Geo. V, c. 44, S. 3). S. 135 of the Indian Act becomes applicable at once if a case does not fall within para. (*a*).

29th November, 1938. Their Lordships' judgment was delivered by

Lord Macmillan.

LORD MACMILLAN.—On the 15th September, 1932, the Corporation of Calcutta caused to be served upon the owners of certain premises within the municipality, known as No. 82, Nalini Sett Road, a notice assessing the premises at an annual value of Rs. 4,460 for the purpose of the imposition of the consolidated rate which, by S. 124 of the Calcutta Municipal Act, 1923 (Bengal Act III of 1923), the Corporation is authorised to impose upon all lands and buildings in Calcutta. The premises having been newly erected had not previously been valued.

On an objection by the owners the valuation was reduced by the Deputy Executive Officer to Rs. 4,025. Being dissatisfied with his decision the owners appealed under S. 141 of the Act to the Court of Small Causes which reduced the valuation to Rs. 3,168. From the order of the Chief Judge of the Court of Small Causes the Corporation in turn appealed under S. 142 of the Act to the High Court which on the 13th March, 1936,

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dismissed the appeal. The High Court refused an application by the Corporation for leave to appeal to His Majesty in Council but on a petition subsequently presented to His Majesty in Council special leave to appeal was granted, the Corporation by their counsel agreeing to pay the respondents' costs of the appeal in any event. The Corporation is accordingly the appellant in the present appeal and the owners of the premises are the respondents.

The method of ascertaining the annual value of premises is prescribed in S. 127 of the Act of 1923 as follows:—

" 127. For the purpose of assessing land and buildings to the consolidated rate,—

(a) the annual value of land, and the annual value of any building erected for letting purposes or ordinarily let, shall be deemed to be the gross annual rent at which the land or building might at the time of assessment reasonably be expected to let from year to year, less, in the case of a building, an allowance of ten per cent. for the cost of repairs and for all other expenses necessary to maintain the building in a state to command such gross rent; and

(b) the annual value of any building not erected for letting purposes and not ordinarily let shall be deemed to be five per cent. on the sum obtained by adding the estimated present cost of erecting the building, less a reasonable amount to be deducted on account of depreciation (if any), to the estimated present value of the land valued with the building as part of the same premises."

It will be observed that two different methods of valuation are prescribed, one for "any building erected for letting purposes or ordinarily let" and the other for "any building not erected for letting purposes and not ordinarily let." The first question therefore which arises with regard to any building which has to be valued is whether it falls within the first class or within the second class. In the present case the evidence of the facts is meagre and unsatisfactory, but both parties were content to accept, for the purpose of raising the question of principle, the finding of the Chief Judge of the Court of Small Causes that "roughly half the premises is in actual occupation of the owner and half utilized for letting purposes." This is not a finding in terms of the Act but again the parties were content to accept it as equivalent to a finding that roughly the building as to one half is "ordinarily let" and as to the other half is "not ordinarily let."

Confronted with a building of this hybrid character, the Chief Judge of the Court of Small Causes solved the problem

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of valuation by valuing one half of it under para. (*a*) of S. 127 as being ordinarily let and one half of it under para. (*b*) as not being ordinarily let, and arrived at the valuation of the building as a whole by adding together the products of the two calculations. The High Court endorsed this method as the right one to adopt. The learned Judges stated that in the case of a building part of which answered the description in para. (*a*) and part of which answered the description in para. (*b*) "it would seem to be a misreading of the section to say that in spite of this fact the entire building must be taken as belonging to one of the two classes mentioned in S. 127. . . . For the purpose of S. 127 'building' must include part of a building and it is quite conceivable that one part of the building will come under cl. (*a*) and another part of the building under cl. (*b*).

Their Lordships cannot regard this method of valuation as permissible on a sound construction of S. 127. The section may not be very satisfactorily framed but it is sufficiently clear that it was intended to classify all buildings as falling within one or other of two mutually exclusive categories. Each building is treated as a unit of valuation, and its value must be ascertained in conformity with one or other of the two prescribed methods; it cannot be valued as to one part by one method and as to another part by another method for in that case the building as a unit could not be said to have been valued by either method, having been valued by both methods. No provision is made in S. 127 for the case of a hybrid building, part of which answers the description in para. (*a*) and part of which answers the description in para. (*b*). The definition of the word "building" in S. 3 (7) of the Act has no bearing on the present question and in particular it does not define the word as including "part of a building." The only provision for dividing a building appears to be in S. 135 which authorises the Executive Officer "in his discretion" to assess any portion of a building separately from the other portions of such building, whereupon the portion so separately assessed is to be deemed a separate building. It does not appear that the Executive Officer was asked to adopt this course in the present case, and at any rate he did not do so. Consequently the entire building must be treated as a single building forming a unit of assessment, and indeed in the result

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the Courts below have so treated it, for they have arrived at one valuation for the building as a whole, though they have utilised two methods of valuation for one and the same building.

Of a building as to one half ordinarily let and as to one half not ordinarily let it cannot be predicated that it is ordinarily let, for only a part of it is ordinarily let. But it can be predicated of it that it is not ordinarily let if only a part of it is ordinarily let, for the whole of it is not ordinarily let. The test must be applied to every building as a whole and one or other method of valuation must be applied to it as a whole. There may possibly be cases where the portion ordinarily let or the portion not ordinarily let is so negligible in proportion to the whole of the building that the building might on the principle of *de minimis* be reasonably held as a matter of fact to be not ordinarily let or ordinarily let as the case may be, but the present is clearly not such a case.

Their Lordships are accordingly of opinion that the building in question was rightly valued by the Executive Officer in conformity with the method prescribed in para. (*b*) of S. 127. They will therefore humbly advise His Majesty that the appeal should be allowed; that the judgment of the High Court dated the 13th March, 1936, except in so far as it finds no costs due to or by either party, and the judgment of the Chief Judge of the Court of Small Causes dated the 23rd March, 1934, should be recalled; and that the order of the Deputy Executive Officer dated the 15th September, 1933, should be restored. The appellants, in fulfilment of their undertaking, will pay the respondents' costs of the present appeal.

Solicitors for Appellants: *T. L. Wilson & Co.*

Solicitors for Respondents: *Hy. S. L. Polak & Co.*

R.C.C. —— *Appeal allowed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Ordinary Original Civil Jurisdiction.)

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE MADHAVAN NAIR AND MR. JUSTICE VARADACHARIAR.

Pr. Al. M. Muthukaruppan Chettiar carrying on money-lending business with headquarters at Paganeri, Ramnad District, by his power of Attorney Agent K. Thiruvengadam Aiyangar .. *Petitioner**

v.

The Commissioner of Income-tax, Madras, having his office in the old High Court Buildings, Madras .. *Respondent.*

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Income-tax Act (XI of 1922), Ss. 13 and 23 (3)—Account books—Entries relating to foreign business not included—Rejection of books and assessment on an estimate—If proper—Claim for deductions—Necessity to give particulars required by S. 10 (2), proviso (a)—Foreign business—Profits made four years before assessment—Not taxable in British India.

The assessment was for 1935-1936 in respect of the headquarters business of the assessee who was a partner in numerous money-lending firms in Burma and Federated Malay States and also owned a rice-mill at Wakema in Burma for which he claimed deduction for depreciation. He had also a money-lending business in Colombo which he closed on 31—5—1930 and transferred the profits to his Singapore partnership. This was included in the assessment as profits from foreign business. The headquarters books did not record the capital invested in Foreign business. The books were rejected and assessment made on an estimate under S. 23 (2).

On the reference,

Held, the income-tax authorities cannot require the assessee to keep the books of his business in British India in a particular manner and they cannot require him to include in his books the details of his business abroad. The Income-tax Officer had no right to reject the headquarters account books and make the assessment on an estimate.

When claiming a deduction an assessee must give the particulars required by proviso (*a*) of S. 10 (2).

Profits made in the Colombo business (transferred to Singapore) having been earned four years before the year of assessment is not assessable to Indian income-tax.

The following are extracts from the Order of Reference by the Commissioner of Income-tax, Madras:—

The assessee thereupon moved the High Court under S. 66(3) of the Act. The High Court by its order dated 13th October, 1937,

* O.P. No. 136 of 1937. 27th October, 1938.

has directed me to state a case and refer the following four questions, which I accordingly refer, for the decision of the Hon'ble Judges of the High Court:—

Is there any evidence to support the rejection of the petitioner's account books kept at his headquarters in British India?

Is the petitioner entitled in law to a deduction of Rs. 1,875 in respect of depreciation of machinery in the Wakema Mill, he having leased the mill?

Is the Income-tax Officer entitled in law to treat the remittance of Rs. 88,834 as representing a remittance of profits from a foreign business?

Were there any materials before the Income-tax Officer from which he could hold that debts Nos. 23, 174, 42, 80, 145, 166, 39 and 147 should have been written off before the 12th April, 1931?

Question (i).—The finding of the lower authorities in this case is that the books were incomplete and unreliable. The following reasons justify the finding:—

The books did not give a complete record of the assessee's money-lending capital in that they did not include the amount invested in certain partnerships. S.P.K.A.A.M. Firm, Onhne, was one such partnership in which the assessee had put in not only subscribed capital but also a surplus capital. The interest on this capital was income assessable in his hands; but he did not account for it anywhere. A sum of Rs. 3,399 was included in the assessment on this account;

The assessee admitted that only cash dealings had been entered in the books;

The assessee had in the past omitted certain investments and subsequently admitted the omissions when they were brought home to him;

The assessee being in receipt of large amounts of remittances from his foreign concerns must have laid out the greater part at least of these sums on interest and the paltry sum of Rs. 27 shown in the accounts as interest must have been anything but correct. There is no substance in the argument that no omissions have been detected in the books produced. For that matter, the absence of any entry regarding the investment in the Onhne firm *is* an omission. This investment admittedly belongs to the assessee's headquarters, and in a regular account maintained in the usual course of business one would expect entries relating to such an investment. It is no argument that the investment will find a place in the accounts of the firm. The assessee ought to have accounted for it in *his* books. Not only did he omit to do so, but he also failed to

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include the interest on it in his return. To a Nattukottai Chetti his headquarters books constitute the most important record of his financial position. An account which fails to make mention of a large investment such as the one mentioned above must be condemned as incomplete and unreliable, and this, if nothing else, is sufficient justification for its rejection. The "method of accounting" employed by the assessee is such that his income, profits and gains could not properly be deduced therefrom; and it was therefore open to the Income-tax Officer under S. 13 of the Act to make the computation of the income on such basis and in such manner as he might determine. There was a finding in fact by the Income-tax Officer that the assessee's account did not represent a complete and correct version of his business at headquarters. In the light of this finding, which is based on evidence, the Income-tax Officer estimated the income at a certain figure. The question whether there is evidence to support the rejection of accounts should in the circumstances be answered in the affirmative.

Question (*ii*).—Depreciation is an allowance granted to an assessee in respect of buildings, machinery, plant or furniture which are his property and are used for the purpose of the business carried on by him. The allowance is calculated at a sum equivalent to a percentage prescribed by the rules on the original cost of the asset to the assessee. The Act also lays down that the allowance shall be granted "provided that the prescribed particulars have been duly furnished." All these conditions have to be satisfied before an assessee can get the allowance. The Income-tax Officer disallowed the claim on the ground that the assessee did not work the mill himself. In view of the decisions in *Mangalagiri Rice Factory* v. *Commissioner of Income-tax, Madras*[1] and *S. Roy Chowdhury* v. *The Commissioner of Income-tax, Bengal*[2], this is not, perhaps, a valid reason. But, as observed by the Assistant Commissioner, there was another reason for the disallowance, and that was the assessee's failure to furnish the "prescribed particulars." The assessee knew that he had to furnish such particulars, but he failed to furnish them, even before the Assistant Commissioner up to the time of his passing his appellate order. It was not enough to say that he purchased the mill for Rs. 30,000. How much of this Rs. 30,000 represented value of site on which depreciation is not allowable and how much value of buildings, depreciation on which is at 5 per cent. and how much value of machinery, depreciation on which is at $6\frac{1}{4}$ per cent. had to be stated. This failure therefore is the vital point and that invalidates the

1. (1926) 2 I.T.C. 251. 2. (1935) 8 I.T.C. 177.

claim. The answer to the question should be that the assessee was not in law entitled to this allowance for depreciation since he did not fulfil the required conditions.

Question (iii).—The ordinary presumption is that if there are profits in an assessee's foreign business money remitted from that business to the assessee in British India comes from profits and not from capital unless the assessee proves the contrary. The onus of proof that a remittance is from capital and not from profits is upon the assessee. Although the wording of the question conveys the impression that the assessee does not admit that the remittance was from profits, his real intention seems to be to raise the question whether the remittance could be said to be from the profits of the Singapore business accruing or arising during the years 1931-32 to 1934-35 rather than from the old profits of the defunct partnership of Colombo which had been transferred to Singapore in 1930 and which according to him were available for remittance. The facts are as stated in para. 5 *supra*. Before the Income-tax Officer the assessee contended that the sum of Rs. 87,199 received through K.A.R.S.T., Rangoon, was identical with the old Colombo profits as it was out of those old profits that the loan of $48,300 had been advanced to K.A.R.S.T., Rangoon, and that the sum received from K.A.R.S.T., Rangoon, in repayment of the loan should therefore be regarded as made up of the same old profits. It is incorrect to say that the amount of $48,300 lent by the Singapore firm to K.A.R.S.T. on 16th May, 1931, was part of the sum of $57,630 which the assessee received from Colombo on or before 8th August, 1930, and invested in the Singapore firm on that date. The sum of $57,630 on its transfer from Colombo to Singapore became part of the funds of the Singapore firm. When the Singapore firm, nine months later, gave a loan of $48,300 to K.A. R.S.T. the money came out of the funds of the firm and it was obviously not possible to identify that loan as having come out of the sum of $57,630. If it is the assessee's case that the loan to K. A.R.S.T. was made by the Singapore firm on the assessee's behalf out of the assessee's money then that loan would have been shewn in the Singapore books as a debit to the account of P.R.A.L.M., Colombo, and not to the debit of K.A.R.S.T. as it was actually shewn. By debiting the loan to the account K.A.R.S.T. the Singapore firm has treated the loan as made on its own account and not on behalf of the assessee. The assessee of course takes his stand on the entries in the accounts and also on a letter said to have been written by him to the Singapore firm on 30th April, 1934 (18th Chitrai, Bhava) instructing the latter to send to him hundies for the sum of $57,000 representing his share of the Colombo profits. As I have already

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explained the entries in the accounts militate against the assessee's contention as regards the identity of the two amounts. If the loan of $48,300 to K.A.R.S.T. was intended to be made out of the assessee's Colombo profits it is not clear why the Singapore firm did not then and there debit the sum to the folio in which those profits were credited, so that the transaction would be one between the assessee and K.A.R.S.T. instead of between the Singapore firm and K.A.R.S.T. That would have enabled the assessee to argue later on, when K.A.R.S.T. returned the money, which he would have done direct without the intervention of the Singapore firm, that the sum received was the old Colombo profits which he had withdrawn from the Singapore firm and lent to K.A.R.S.T. By letting the Singapore firm have the money (Colombo profits) and by the firm lending a certain sum out of its general funds to K.A.R.S.T. the assessee allowed the identity of the former to be destroyed. In fact there is no evidence that the sum of $57,630 or any part of it was available *as Colombo profits* in Singapore at the time when $48,300 was lent by the firm to K.A.R.S.T. What was received back by the firm—or for that matter by the assessee at the instance of the firm—from K.A.R.S.T. was therefore not the old Colombo profits, but part of the general funds of the firm on the date of receipt. The debit to the Colombo folio of the amount paid by K.A.R.S.T. to the assessee does not establish its identity with Colombo profits, any more than the advancing of a loan of $48,300 by the Singapore firm to K.A.R.S.T. more than nine months after the assessee's Colombo profits were received at Singapore establishes its identity with those profits. Similarly there is nothing to show that the sum of Rs. 1,635 ($1,051) covered by the hundi drawn on M. K. firm, Karaikudi, actually came out of the old Colombo profit. It was a remittance from the Singapore firm out of its general funds. The lower authorities therefore were, in my opinion, perfectly justified in disregarding the entry in the accounts as well as the letter produced to bolster up the claim.

An examination of the accounts of the Singapore firm shows that the assessee had more than one account to show his capital investments. These Colombo profits were evidently left with the Singapore firm as additional capital for the use of the firm. This new account therefore added one more to these capital accounts. Really all these capital accounts ought to be regarded as one capital account. There is nothing to show that the assessee's *capital* in the firm at Singapore has been depleted to the extent of the sums remitted. It is not disputed that the assessee had at Singapore a larger amount of profit available for remittance than is covered by

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these remittances. The natural and proper inference in the circumstances is that the assessee intended to withdraw his profits and that these remittances were made out of his share of the current profits of the Singapore firm. The answer to the question should be that in the circumstances of the case the Income-tax Officer was not bound to accept as conclusive the entry in the books and the letter, especially in the absence of corroborative contemporary evidence to identify the remittances with the old Colombo profits, and that the Income-tax Officer was entitled in law to treat the remittances in question as remittances out of the assessee's share of the current profits of the Singapore firm.

Question (*iv*).—The question of bad debts relates to 8 out of the 15 items disallowed by the Income-tax Officer. Of these 15, 5 were allowed by the Assistant Commissioner on appeal. Out of the remaining 10, the assessee objects to the disallowance of only 8; the other 2 items are trivial, involving a sum of $130 only. The question propounded is whether there were materials before the Income-tax Officer on which he could hold that these debts should have been written off before 12th April, 1931. The Income-tax Officer found that lands had been taken in full settlement before 1931-32 and therefore disallowed the loss on account of bad debts written off in March, 1934. The Officer came to this finding on the materials placed before him in the course of the assessment proceedings. The finding that lands had been taken in full settlement applies only to 5 out of the 8 items. The 3 excepted items are debts bearing Nos. 80, 147 and 166. The facts relating to these are discussed lower down.

On appeal the Assistant Commissioner allowed 5 out of the 15 items disallowed by the Income-tax Officer, because in these cases the dates of the last realization from the debtors fell between January and March, 1931 and the Assistant Commissioner thought that the assessee was perhaps justified in waiting some time after 12th April, 1931, to see whether anything further could be recovered. As for the remaining items, the dates of last realization were much earlier and the Assistant Commissioner thought that the assessee should have written them off at the end of that year (1930-31). The particulars furnished by the assessee showed that the properties mortgaged in items 23, 174, 42, 145 and 39 had been sold between March and November, 1930, and that the circumstances of the debtors were such that the assessee could have had no reasonable expectation of recovering anything beyond what had been realized on the sale of the properties. In the remaining three cases, namely, items Nos. 80, 166 and 147, there was no recovery from the debtors after August, 1930. The loans due on items

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Nos. 80 and 166 were on second mortgages and it was known to the assessee in 1930-31 itself that the value of the properties was not sufficient to pay the prior mortgages. In the case of item No. 147 there was a decree of the Court in Singapore but the debtor was an insolvent and the only recovery that was made was in August, 1930, and there appeared to be no prospect of any further dividend. The fact that the loans had not become barred by limitation by 12th April, 1931, and the assessee could wait some time longer does not mean that the debts had not already become bad in 1930-31. Subsequent events showed that the waiting was ineffectual. The question, the Income-tax Officer, and after him the Assistant Commissioner, had to decide in these cases was *when* the debts actually had become bad and irrecoverable. On the facts placed before them the Income-tax Officer and the Assistant Commissioner found that they must have become bad in 1930-31 and that finding cannot be said to be wholly unwarranted or perverse.

In the light of these facts, it cannot be said that there were no materials to justify the finding of the Income-tax Officer as regards the point of time at which the debts became bad.

The question should be answered accordingly.

P. R. Srinivasan for Petitioner.

M. Palanjah Sastri for Respondent.

The judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—This reference relates to the assessment to income-tax of one Pr. Al. M. Muthukaruppan Chettiar for the year 1935-36. The assessee lives at Paganeri in Chettinad where he has his business headquarters. He is a partner in numerous money-lending firms carrying on business in Burma and the Federated Malay States and is the owner of a rice-mill at Wakema in Burma. Until 1930 he had also a money-lending business in Colombo. He was assessed in respect of his business at headquarters and on sums which were held to be remittances of profits from foreign business. Four questions are embodied in this reference, namely:—

(1) Is there any evidence to support the rejection of the assessee's account books kept at his headquarters in British India?

(2) Is the assessee entitled in law to a deduction of Rs. 1,875 in respect of depreciation of machinery in the Wakema mill, he having leased the mill?

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(3) Is the Income-tax Officer entitled in law to treat the remittance of Rs. 88,834 as representing a remittance of profits from a foreign business?

(4) Were there any materials before the Income-tax Officer from which he could hold that debts Nos. 23, 174, 42, 80, 145, 166, 39 and 147 should have been written off before the 12th April, 1931?

The first question relates to the assessment in respect of the assessee's business at headquarters. The assessee returned a loss, but the Income-tax Officer came to the conclusion that he had made a profit of Rs. 5,000. The assessment was made under S. 23 (3) of the Income-tax Act after the Income-tax Officer had rejected the assessee's books. It is not suggested that the books are false; it is accepted that they are correct as far as they relate to the business at headquarters. The Income-tax Officer however rejected the books on the ground that they did not "record the capital invested in the various concerns both individually and in partnership in Burma and outside British India and therefore could not be held to be complete." On appeal the Assistant Commissioner concurred in the rejection of the books on the ground that "the appellant did not produce proper account books showing his total wealth and its distribution." The Income-tax authorities cannot require the assessee to keep the books of his business in British India in a particular manner and they cannot require him to include in his books the details of his business abroad. In addition to producing the books which related to the transactions in respect of the business at headquarters he produced copies of the books of the firms abroad in which he was interested. He was not asked to produce the originals, nor was it suggested that the copies were in any way inaccurate. It comes to this: the books were rejected because they did not include entries relating to foreign business which would have been convenient for the Income-tax authorities when investigating the profits made abroad. In his statement referring this case to the Court the Commissioner of Income-tax attempts to justify the rejection of the books under the provisions of S. 13 of the Act. We have pointed out in another case* to-day that S. 13 relates only to the method of accounting, and the books cannot be rejected

*_Subbayya_ v. _The Commissioner of Income Tax, Madras_, O. P. No. 126 of 1937.

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merely because the method of accounting does not appeal to the Income-tax Officer. The Income-tax Officer may adopt the method of accounting which he prefers, but he cannot reject an assessee's books by reason of the provisions of S. 13. Nor had the Income-tax Officer the right to reject the books in question because they did not relate to the foreign business. They related to the business which was being assessed, namely, that at headquarters, and were not false or incomplete. It follows that there is no evidence to support the rejection of the account books and this being so the Income-tax Officer had no right to make the assessment on an estimate. He should have paid regard to the entries in the books. This is the answer to the first question.

With regard to the disallowance of the sum Rs. 1,875 in respect of depreciation of machinery in the Wakema rice-mill, the Income-tax Officer wrongly held that the deduction claimed was not allowable in law. It was disallowed because the mill had been worked by the lessee and not by the owner. The disallowance was nevertheless proper. When claiming a deduction an assessee must give the particulars required by proviso (*a*) of S. 10 (2). This he admittedly failed to do and therefore he was not in a position to claim the deduction. The answer to the second question is that in the circumstances the assessee is not entitled in law to the deduction.

The Income-tax Officer has treated as a remittance of profits a sum of Rs. 88,834 which the assessee received from Singapore on the 10th May, 1934. The assessee closed his money-lending business in Colombo on the 31st May, 1930, having made a profit there of $57,650. He then transferred this sum to Singapore, where he had carried on a money-lending business for several years previously in partnership with others. The original partnership in Singapore was wound up in 1930 and on the 8th August of that year the assessee entered into a new partnership there. To this new partnership he contributed three sums as his share of the capital, namely:—(1) The $57,650, the profits which he had made in Colombo, (2) $51,046, the profits which he had received from the earlier partnership in Singapore, and (3) $16,000, being the amount of the capital he had invested in the earlier Singapore partnership. These three sums were entered in separate accounts in the books of the new firm. The assessee says that the sum of

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Rs. 88,834 represents a withdrawal from the account relating to the profits made in Colombo. It is not disputed that if this sum in fact represents profits made in the Colombo business it is not assessable to Indian income-tax, having been earned four years before the year of assessment. The onus of proving that this sum represented profits made in Colombo was on the assessee and the Income-tax authorities held that he had not discharged it, but this finding must be held to be without foundation in view of the following facts which are beyond dispute:—(1) In 1930 the assessee remitted from Colombo to Singapore a sum representing profits which was more than sufficient to provide the remittance in question; (2) this money was kept in a separate account in Singapore; (3) the remittance in question was debited to this account; (4) specific instructions requiring the remittance to be debited to this account were given in a letter written by the assessee. But the matter does not end there. On the 13th April, 1934, the assessee received from Singapore a remittance of Rs. 15,000 which was debited to the account relating to his profits in the previous partnership in Singapore and on the 17th May, 1934, he received a remittance of Rs. 20,000 which was also debited to this account. The Commissioner of Income-tax has recognised that these remittances of Rs. 15,000 and Rs. 20,000 do represent profits made in Singapore before the 12th April, 1931. In fact he reversed a decision of the Income-tax Officer holding that these remittances represented profits made subsequent to that date. There is no difference whatever between these remittances and the remittance of Rs. 88,834 and if it was right—as it undoubtedly was—to treat the remittances of Rs. 15,000 and Rs. 20,000 as being remittances of old profits it follows that the remittance of Rs. 88,834 must be treated in the same way. On the evidence before the Income-tax Officer he was bound to hold that the Rs. 88,834 represented a remittance of profits made in Colombo. It is not a question of the discharge of the burden of proof. There was very positive evidence on one side and no evidence at all on which the Income-tax Officer could base his decision. Therefore the answer to the third question must be in the negative.

The answer to the fourth question must also be in the negative. The debts here referred to represent monies which the assessee had lent to various people before 1930, some on security and some without security. In cases where monies

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were lent on securities they had been realised before 1930 or in the course of that year, but in all cases payments to account had been made in 1930. The debts were not written off as irrecoverable in the assessee's books until 1934. It is said that they should have been written off before the 12th April, 1931. There is nothing to warrant this assertion. It was not until after the 12th April, 1931, that the assessee was in a position to know whether the debts were irrecoverable or not. The Assistant Commissioner allowed sums to be written off as irrecoverable when payments had been made to account in January or March, 1931, but he was not prepared to treat the loans in which part repayments had been made in 1930 as being on the same basis, which is illogical. We consider that there were no materials before the Income-tax Officer from which he could hold that these debts should have been written off before the 12th April, 1931.

As the assessee has succeeded in three out of the four questions which refer to the main items, we consider that he is entitled to his costs and these we fix at Rs. 250.

K.S. — *Reference answered.*

THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE LAKSHMANA RAO.

T. S. Shanmugasundaram Pillai .. *Petitioner** (*Accused*)

v.

A. Manicka Mudaliar .. *Respondent* (*Complainant*).

Shanmuga-sundaram Pillai v Manicka Mudaliar.

Criminal Procedure Code (V of 1898 as amended), S. 195 (1) (b), Complaint by Court—Offence falling under S. 193, Penal Code—Complaint for offence under S. 500, Penal Code—Need for complaint by Court.

Parties cannot be allowed to evade the provisions of S. 195 (1) (*b*). Criminal Procedure Code, by filing a complaint under another provision of the Penal Code.

The petitioner charged the son-in-law of the respondent with theft of certain documents and records and in the affidavit filed in support of the application for a search warrant and sworn statement, the petitioner alleged that some of the articles had been secreted in the house of the respondent. A search warrant was issued and the house of the respondent was searched. Nothing was found in the house and the son-in-law was ultimately discharged. The complaint of defamation was founded on the allegations in the affidavit and sworn statement that some of the articles secreted were in the house of the respondent.

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* Cr. M. P. No. 780 of 1938. 25th November, 1938.

Shanmugasundaram Pillai v. Manicka Mudaliar.

Held, that the offence charged would fall under S. 193, Penal Code and that it could not be taken cognizance of without a complaint by the Court.

Appadurai Nainar, In re (1935) 69 M.L.J. 812: I.L.R. 59 Mad. 165, relied on.

Petition praying that in the circumstances stated therein the High Court will be pleased to quash the proceedings of the Court of the Sub-Divisional First Class Magistrate of Tiruvallur dated 2nd August, 1938, taking on file the complaint of the respondent herein in C.C. No. 44 of 1938.

V. N. Shama Rao and *C. V. Nilakantam* for Petitioner.

V. T. Rangaswami Aiyangar and *K. Ramaswami Aiyangar* for Respondent.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Court made the following

ORDER.—This is an application to quash the proceedings in C. C. No. 44 of 1938 on the file of the Sub-Divisional Magistrate of Tiruvallur instituted by the respondent against the petitioner under S. 500 of the Indian Penal Code and the facts are not in dispute. The petitioner charged the son-in-law of the respondent with theft of certain documents and records from the Bhavanandam Academy and in the affidavit filed in support of the application for a search warrant and the sworn statement, the petitioner alleged that some of the articles had been secreted in the house of the respondent. A search warrant was issued and the house of the respondent was searched. Nothing was found in the house and the son-in-law was ultimately discharged. The complaint of defamation is founded on the allegations in the affidavit and sworn statement that some of the articles were secreted in the house of the respondent and those allegations are stated to be false. The offence committed would therefore fall under S. 193 of the Indian Penal Code which cannot be taken cognizance of without a complaint by the Court, and as laid down in *Appadurai Nainar*, In re,[1] parties cannot be allowed to evade the provisions of S. 195 (1) (*b*) of the Code of Criminal Procedure by filing a complaint under another provision of the Indian Penal Code. The petition is therefore allowed and the proceedings in C. C. No. 44 of 1938 on the file of the Sub-Divisional Magistrate of Tiruvallur are quashed.

B.V.V. —— *Petition allowed.*

1. (1935) 69 M.L.J. 812: I.L.R. 59 Mad. 165.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW.

Komari Pothuraju Setty and another .. *Petitioners* in both (Accused 1 and 4).*

v.

Krishnapatam Padda Poliah and another .. *Respondents in both (Complainants).*

Pothuraju Setty. *v.* Padda Poliah.

Penal Code (XLV of 1860), S. 499—Excommunication—No caste meeting or decision—Question not within jurisdiction of caste panchayat—Publication as to expulsion from caste—Offence of defamation—Scope of exception 9 to S. 499.

A caste panchayat can no doubt deal with offences, relating to caste usages and customs but it has no jurisdiction to decide questions regarding private property or impose any sanction such as loss of caste on any member of the community who declines to part with his property.

Where there was a publication that certain members of a community had been put out of caste on account of their having refused to part with certain property, as desired by members of their community, and it appeared that there was no actual decision by the caste panchayat as regards their ex-communication,

Hed, that the publication in question constituted the offence of defamation.

Exception 9 to S. 499, Penal Code, does not mean that in order to bring pressure to bear upon a person to part with his property which he is entitled in law to keep, a defamatory allegation can be made on the ground that it is for the protection either of the person who made it or of the community to which he belongs.

Petitions under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Sub-Divisional Magistrate, Kavali, dated 6th April, 1938, in C. C. Nos. 101 and 102 of 1937 respectively.

R. Gnanasambandam for Petitioners.

P. Chandra Reddi and *R. Ramalinga Reddi* for Respondents.

A. S. Sivakaminathan for *The Publci Prosecutor* for the Crown.

The Court made the following

ORDER.—These are petitions to revise the order convicting and sentencing the petitioners, two in number, in C.C. Nos. 101 and 102 of 1937 on the file of the Sub-Divisional Magistrate,

*Crl. R. C. Nos. 566 and 567 of 1938 (Crl. R. P. Nos. 537 and 538 of 1938). 15th December, 1938.

Kavali. The petitioners have been convicted of defamation and sentenced to pay a fine of Rs. 30 each or in default to suffer simple imprisonment for one month in respect of both the cases. The petitioners as well as the complainants in the case are members of the fishermen community in Ponnapady Village, Kovur Taluk. It is admitted that when the Government put up for auction certain waste lands in the village, there was a general feeling in the community that no one should bid for these lands because if there were no bids the lands could be got for the community as a whole at a cheap rate. The complainants were not satisfied with this resolution of the community and they bid for the lands and obtained certain lands from the Government at the auction. The community then brought pressure to bear upon the complainants to give up their lands to the community on receiving what they had paid for them, and it is alleged, with some profit also. But they refused to do so and on their refusal they were put out of caste. The ex-communication was notified to members of the community in other villages also and it is in respect of this publication of the excommunication that the charges of defamation were brought.

It is not seriously argued that there was no publication and it cannot be disputed that the publication amounts to defamation unless the publication comes within one or other of the exceptions to S. 499, Indian Penal Code. It could hardly be argued that informing people even of one's own community that a certain person has been ex-communicated from his caste does not harm that person's reputation in the eyes of his fellows. Nor could it be said that such a consequence is not one which the person who made the publication could not have known to be likely. The question therefore is whether the publication is covered by any of the exceptions to S. 499, Indian Penal Code. Reliance was placed before me only on the ninth exception which excepts imputations made in good faith for the protection of the interest of the person making it or of any other person or for the public good. This exception does not mean that in order to bring pressure to bear upon a person to part with his property which he is entitled in law to keep, a defamatory allegation can be made on the ground that it is for the protection either of the person who made it or of the community to which he belongs. It was argued that the publication was made in pursuance of a decision pronounced by D.W. 1 who is

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described as the headman of 64 fishermen villages. But this decision does not expressly record that excommunication should follow as a result of any refusal on the part of the complainants to give up the lands. In substance what happened is that because the complainants refused to part with the lands which they had bought in the auction, communications were sent to members of the community elsewhere that the complainants had been put out of caste. It is not proved that there was any actual decision by the caste panchayat to this effect, namely, that the complainants should be out-casted on this ground. Even if there was such a decision, it could not be regarded as having any validity. A caste panchayat can no doubt deal with offences relating to caste usages and customs, but it has no jurisdiction to decide questions regarding private property or impose any sanction such as loss of caste on any member of the community who declines to part with his property. I am therefore of opinion that the publication in question constituted the offence of defamation. The sentences cannot be said to be too severe in the circumstances. The petitions are dismissed.

B.V.V. —— *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ABDUR RAHMAN.

V. V. Vythilingam Pillai .. *Appellant* (Petitioner-Decree-holder)*

v.

Seshan minor by guardian Fankajathammal .. *Respondent (1st Respondent).*

Vythilingam Pillai v. Pankajathammal.

Civil Procedure Code (V of 1908), O. 22, r. 4—Impleading legitimate son as legal representative—Plaintiff acting bona fide*—Absence of collusion—Other legal representative if bound by decree.*

Where the mortgagee plaintiff was shown to have impleaded the legitimate son of the deceased mortgagor defendant as his legal representative and it was further shown that the plaintiff was not aware of the existence of an illegitimate son of the deceased, and that the legitimate son who was sued was in possession of the estate left by the deceased, and there was no evidence that there was any collusion between the decree-holder and the legitimate son,

Held, that the plaintiff's action in impleading the legitimate son was *bona fide* and that the decree taken against him was binding on all the legal representatives of the deceased.

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* A.A.A.O. No. 132 of 1935. 18th November, 1938.

Vythilingam Pillai v. Pankajath-ammal.

Appeal against the order of the District Court of Trichinopoly dated 25th January, 1935 and made in A. S. No. 175 of 1934 preferred against the order of the Court of the District Munsiff of Trichinopoly dated 1st August, 1934, and made in E.A. No. 788 of 1934 in O.S. No. 288 of 1930.

M. S. Vaidyanatha Aiyar for Appellant.

A. V. Narayanaswami Aiyar for Respondent.

The Court delivered the following

JUDGMENT.—One Srinivasulu Naidu executed a mortgage in favour of the appellant on the 3rd July, 1921. The mortgagor died leaving him surviving a legitimate son, an illegitimate son and a concubine. The appellant instituted a suit on the basis of the mortgage after the mortgagor's death (O.S. No. 288 of 1933). He did not know of the existence of the illegitimate son and the concubine and thus impleaded the legitimate son alone who was considered by him to be the sole legal representative of the deceased mortgagor. It might be stated here that the legitimate son was in possession of the properties left by his father Srinivasulu Naidu including the house mortgaged by him. A decree was passed in favour of the appellant mortgagee on the 22nd October, 1930. In execution of this decree the mortgagee brought the property to sale and purchased it himself sometime in 1934. It seems that before the appellant had obtained the mortgage decree a suit was filed by the illegitimate son who is the respondent in this appeal (and the first respondent in the trial Court) for partition and by the concubine (who is the second respondent in the trial Court) for maintenance on the 7th March, 1930. This was decreed on the 15th April, 1931. A final decree was passed on the 11th February, 1932, under which the first respondent got one-fourth share of the house mortgaged by his father and the second respondent got a charge in respect of the three-fourths of the house in lieu of her maintenance. The first respondent appears to have taken possession of the house through Court on the 18th August, 1932. After the purchase of the property the appellant-auction-purchaser tried to take possession through Court, but he was obstructed by the first and the second respondents and made an application for the removal of obstruction to the District Munsiff of Trichinopoly on the 29th March, 1934. It was contended on behalf of the first and

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the second respondents that they were not parties to the decree and were therefore not bound by it. They also pleaded collusion between the decree-holder and the legitimate son. The executing Court's judgment is not very explicit but in the absence of evidence on the record in regard to collusion between the appellant-decree-holder and the legitimate son it may be taken that the executing Court found against it. Holding that the concubine, that is the second respondent was not in possession of the house he declined to accept the objection raised on her behalf but finding that the illegitimate son, that is, first respondent was in actual possession of one-fourth of the house on his own behalf his objection was accepted with the result that the appellant-decree-holder was ordered to be put into possession of the three-fourths of the house purchased by him but the Court declined to deliver possession to him in regard to the remaining one-fourth. The appellant-decree-holder filed an appeal against that order to the District Judge of Trichinopoly who dismissed it in a very brief order on the ground that it was not competent as the order was passed by the executing Court under O. 21, r. 97, Civil Procedure Code. The present appeal has been filed against this order.

The narrative of facts which has been given above would show that the only question which arises for decision in this appeal is whether the illegitimate son was bound by the decree obtained by the auction-purchaser against the legitimate son in October, 1930. As I have said above. there is no evidence on the record that there was any collusion between the decree-holder and the legitimate son. There is nothing to show that the decree-holder knew of the existence of the illegitimate son or of the concubine before he filed a suit or obtained his decree. Moreover the legitimate son was in possession of the whole of the estate left by his father at the time when the suit was instituted or even when the decree was obtained on the basis of the mortgage. It must therefore be held that the decree-holder's action in impleading the legitimate son, who would in the ordinary course be the only legal representative was *bona fide*. This however would not be enough if the general principle of law that a person is not bound by a decree to which he is not a party is held to govern the present case. If that principle be held to be applicable there is no doubt that the order passed by the learned District Judge would be correct and

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the only remedy which the appellant before me would have is to file a suit and appeals either to the lower appellate court or to this Court would not be competent. On the other hand if it be found that although not a party to the suit he was yet bound by the decree passed against the legitimate son as the legal representative of his father, appeals would be competent. This can only be if the first and the second respondents are held to be judgment-debtors within the meaning of O. 21, r. 98 and the order refusing to deliver possession found to be appealable as a decree.

There has been some divergence of opinion between the different High Courts on this question. While the Calcutta and the Allahabad Courts appear to have taken the view that in these circumstances the person who was not impleaded as a defendant in the case would not be bound by the decree which was passed in his absence (*Jagannath* v. *Mt. Jamuna Bai*[1], and *Dwipalchandra Bardhan* v. *Jeeban Debi*[2]), this Court has held in a number of decisions that if the plaintiff believed *bona fide* that the person who was sued was the proper legal representative of his debtor and a decree was obtained against him without any fraud or collusion the proper legal representatives would be bound by the decree even if they were not impleaded in the suit. A great deal can be said in favour of the view if one finds the person who has been sued as a legal representative happens to be in possession of the estate left by the deceased. The case would be still stronger if the interest of the person who had been sued turns to be identically the same as of those who were not impleaded for want of knowledge on the part of the plaintiff. It is impossible to say in these circumstances as to what view one would have formed if the matter were *res integra*. But since the matter has been decided by not one but three if not four Division Benches of this Court and those decisions are binding on me, it is impossible for me to go into the question *de novo* and find for myself whether the decree passsed against the legitimate son in this case would not be binding on the illegitimate son and the concubine, that is the first and the second respondents. See *Ramaswami Chettiar* v. *Oppilamani Chetti*[3], *Gnanambal Ammal* v. *Veerasami Chetti*[4],

1. A.I.R. 1932 All. 263.
2. ((19?0) I.L.R. 58 Cal. 808.
3. 19 M.L.J. 671: (1909) I.L.R. 33 Mad. 6.
4. (1915) 29 M.L.J. 698.

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Bachu Soorayya v. *Toomuloori Chinna Anjaneyalu*[1] and *Chaturbujadoss Kushaldoss & Sons* v. *Rajamanicka Mudali*[2]. It may be said in regard to the first case that the matter arose in execution and as pointed out by the learned Acting Chief Justice in *Jagannath* v. *Mt. Jamuna Bai*[3] the same principle which would apply to suits may not be held to be applicable to execution. But so far as the three other cases are concerned they cannot be distinguished on their main facts from the present one. Following the cases decided by this Court the first and the second respondents cannot be regarded as persons other than judgment-debtors within the meaning of O. 21, r. 98, Civil Procedure Code. This appeal must therefore be accepted and the order passed by the lower appellate Court set aside. The lower appellate Court is now directed to entertain the appeal filed by the appellant and dispose of the same in the light of my observations according to law. The appellant will have his costs in this Court. Costs in the lower appellate Court will abide the result. Leave refused.

B.V.V. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW.

T. M. Athikesavalu Naidu .. *Petitioner* in both (1st Respondent)*

v.

S. Ekambara Mudaliar and another .. *Respondents in both (Petitioner and 3rd Respondent).*

Athikesavalu Naidu *v.* Ekambara Mudaliar.

Madras Local Boards Act (XIV of 1920), S. 55 (2) (c)—Completion of work undertaken—Money claim against a person under a security agreement—If amounts to subsisting contract—Disqualification for election, if any.

A person contracted to perform a major work for a District Board and executed a bond to the President for a certain sum as security for the due performance by him of the contract. The work was completely performed to the satisfaction of the Board before the date of his nomination as a candidate for a seat on the Board and no claim could be made on the ground that the contract had not been duly performed. The only subsisting contract was a contract whereby the Board was permitted to recover under the security agreement from the deposit made by him such amount as was covered by any objection that may be made by the Audit Department.

1. (1918) 36 M.L.J. 106.
2. (1930) 60 M.L.J. 97 : I.L.R. 54 Mad. 212.
3. A.I.R. 1932 All. 263.

* C. M. P. Nos. 4775 and 5376 of 1938. 24th January, 1939.

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Held, that the person was not disqualified for election, as the money claim that may possibly be made is not a contract of the kind contemplated in S. 55 (2) (*c*) of the Madras Local Boards Act. A contract which had ceased to be enforceable and under which no claim could be made by either party could not be regarded as a 'subsisting contract'.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records in O. P. No. 11 of 1938 on the file of the Election Commissioner—Subordinate Judge, Vellore, and to quash his order passed therein and to declare that the petitioner herein has been duly elected.

V. T. Rangaswami Aiyangar and *K. Ramaswami Aiyangar* for Petitioner.

K. Rajah Aiyar for 1st Respondent.

The Court made the following

ORDER.—This is an application for issue of a writ of *certiorari* and for quashing the order of the Election Commissioner of Vellore in O. P. No. 11 of 1938. The petitioner and the first respondent were both candidates for election as member of the District Board of North Arcot. The first respondent in this petition was the petitioner before the Election Commissioner. His nomination paper had been rejected by the Election Officer on the ground that he was interested in a subsisting contract with the Board with the result that the only other candidate, the present petitioner, was declared elected. The validity of that election was questioned by the first respondent whose nomination had been rejected and the Election Commissioner upheld his petition for setting aside the election of the petitioner. The Election Commissioner, that is the Subordinate Judge of Vellore held that the first respondent was not interested in a subsisting contract with the Board on the date of nomination and accordingly allowed the petition. As a result a fresh election was ordered to be held and the present petitioner has come to this Court for issue of a writ of *certiorari* and for quashing the order of the Election Commissioner; in this connection there was an application for stay made by the petitioner and an interim stay was ordered as regards the publication of the list of valid nominations. This interim stay was ordered on the 15th December, and the petition was directed to be posted for hearing as early as possible. The petition has now been argued before me and the main question in the petition is whether the view of the Election Commissioner that the first

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respondent was not interested in a subsisting contract with the Board is wrong. The contract that was relied upon as one which disqualified the first respondent is Ex. A. That is a contract in respect of a certain major work. That contract recites that it had been agreed that the contractor should execute his bond to the President in a sum of Rs. 100 as security for the due performance by him of this contract and that he had accordingly done so. It then recites the actual terms of the contract. So far as this contract is concerned, it is common ground that the work to which it relates had been completely performed and completely paid for by the Local Board before the date of nomination, so that really nothing remained to be done by either party to the contract. It cannot therefore be said to have been a subsisting contract at the time. Reliance was placed before the Election Commissioner on the decision of a Bench of the Calcutta High Court in *Satyendrakumar Das* v. *Chairman of the Municipal Commissioners of Dacca*[1]. That is referred to by the Election Commissioner in his order and the opinion is expressed that the view adopted in *Satyendrakumar Das* v. *Chairman of the Municipal Commissioners of Dacca*[1] does not really affect the present case because in the present case both parties to the contract had performed what they had contracted to perform. The learned Commissioner points out that the contract account has been closed though the security deposit is kept in a separate account as required by the rules. The position was that, if and when an audit objection is made to any payment made under the contract, the amount covered by the objection could be made good from the amount of the deposit; otherwise the deposit was to be returned to the depositor. The learned Commissioner was of opinion that this meant only that certain payments might be open to question later on in audit and not that the contract itself as such was subsisting. It must be mentioned at the outset that in the corresponding section of the Bengal Municipal Act, 1884, namely, S. 57 the adjective 'subsisting' is not to be found qualifying the word 'contract' as is found in S. 55 (2) (*c*) of the Madras Local Boards Act. This word makes a certain amount of difference because it emphasises the point of view that it is only the existence of a subsisting contract at the time of the nomination that disqualifies

1. (1930) I.L.R. 58 Cal. 180.

the candidate and not the existence of a contract which has ceased to subsist. Obviously a contract which has ceased to be enforceable and under which no claim could be made by either party cannot be regarded as a subsisting contract. In the present case, so far as Ex. A is concerned, that is, the contract in respect of a certain major work, the rights of the parties have been determined and if there is any claim that can be made by the Board, it is only under the security agreement and only as against the amount lying in deposit. But that is not the contract which was alleged to be the contract which disqualified the first respondent. That contract is really different from the contract evidenced by Ex. A. It purports to have come into existence earlier and it must be regarded as subsisting till the audit is complete and no objection is made by the audit department. Though in the first instance security was offered and taken for the due performance of the contract, as the contract has since been fully performed there is at present no possible claim except as regards any excess payment discovered during audit. It has nothing to do with the performance of the work. It cannot be said that any contract relating to the performance of the work was subsisting on the date of nomination. The only right which the Board then had was to recover any amount objected to in audit from the security deposit and nothing more. So far as the performance of the work was concerned, it had been completed to the satisfaction of the Board and no claim could be made on the ground that the contract had not been duly performed. The subsisting contract is therefore only one which relates to the payment of money. It is a contract whereby the Board is permitted to recover from the deposit made by the first respondent such amount as is covered by any objection that may be made by the audit department. A money claim like this—and that too not a claim that has actually accrued but a claim that may possibly be made—is in my opinion not a contract of the kind that is contemplated in S. 55 (2) (*c*). It must be deemed to be covered by the proviso No. 2 to that sub-section. For instance, supposing a tax-payer has a claim for refund from a Municipality, that would not constitute a subsisting contract which disqualify the tax-payer from standing as a candidate in an election. On the other hand, supposing a Municipality has a claim for recovery of the cost of some work against a parti-

Athi-kesavalu Naidu v. Ekambara Mudaliar.

cular candidate, the existence of such a claim would not disqualify the candidate. A mere claim to recover money by the Municipality from the candidate cannot be regarded as amounting to a contract of the kind referred to in S. 55 (2) (*c*). The fact that the claim when made could be satisfied without going to Court by drawing on the amount lying in deposit does not make any material difference for our present purpose. We cannot regard the position as between the Local Board and the first respondent as one which disqualifies a candidate merely because it was possible that an objection might be made by the audit department and the amount covered by the objection might have to be recovered from the security deposit. The reason for the rule of disqualification also does not apply to the facts of the present case. The validity of an objection made by the audit department is not within the competence of the local Board to decide. The decision is either with the audit department or with the Court which may have to adjudicate upon it if a surcharge is made and is objected to by the person or persons surcharged. The Local Board as such cannot legally decide the validity of any objection and there could thus be no real conflict between the interest and the duty of any particular member against whom a claim may be made by the local body. It may as well be contended that because a candidate has filed a suit against a Municipality for a sum of money or the Municipality has filed a suit against a candidate for a sum of money the candidate is disqualified. I am of opinion, therefore, that the view of the learned Election Commissioner is substantially right. It is in my opinion unnecessary to quote authority on this point, nor is it necessary to consider the other question whether there has not been a substantial assignment of even the right of the first respondent to receive the security amount. The decision of the Election Commissioner not being shown to be in contravention of any principle of law cannot be questioned in *certiorari* proceedings. There is no other question raised before me except this question of law that arose for determination by the Election Commissioner, and his decision is in my opinion not only not in contravention of law but is in consonance with law and in accord with a reasonable interpretation of the disqualifying clause which he had to construe. The petition therefore fails and is dismissed with costs, the advocate's fee being fixed at Rs. 100.

The interim stay order dated 15th December, 1938 and made in C.M.P. No. 5376 of 1938 is cancelled.

K. C. ——— *Petitions dismissed.*

Athikesavalu Naidu *v.* Ekambara Mudaliar.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING.

Kayathan Roche *alias* G. C. Roche .. *Petitioner**

v.

K. Chinnayya Roche .. *Respondent.*

Kayathan Roche *v.* Chinnayya Roche.

Court-Fees Act (VII of 1870), Sch. II, Art. 17-A (1)—Court-fee—Criterion—Substance of the relief claimed in plaint—Jurisdiction.

Where the plaintiff's purpose in a suit was to get an adjudication of the void character of a sale deed to which he referred repeatedly in his plaint, though he framed the plaint as if for an injunction restraining the defendant from interfering with the plaintiff's possession,

Held, it was the substance of the relief claimed that should be looked into in questions of court-fee and jurisdiction.

Kattiya Pillai v. *Ramaswamia Pillai*, (1929) 56 M.L.J. 394 and *Purayil Abdullah* v. *Subramanyan Pattar*, (1936) 71 M.L.J. 383: 43 L.W. 715, followed.

Veerappa Chettiar v. *Arunachalam Chetti*, (1935) 43 L.W. 334 and *Karaia Nachi Bivi* v. *Allapichai*, (1937) 1 M.L.J. 572: A.I.R. 1937 Mad. 402, distinguished.

Petition under S. 115 of Act V of 1908 and S. 244 of the Government of India Act, praying the High Court to revise the order of remand of the Court of the Subordinate Judge of Tuticorin dated 15th April, 1937 and made in C. M. A. No. 8 of 1937 (O. S. No. 348 of 1935, District Munsif's Court, Tuticorin).

Facts.—The suit had as its object the avoidance of a sale deed executed by the plaintiff to the defendant. The plaint was framed as one for an injunction restraining the defendant from interfering with plaintiff's possession and as such valued at Rs. 10 and a court-fee of Re. 1-3-0 paid. Under the guise of an injunction, the plaintiff really wanted an adjudication that the sale deed executed by him was void and of no legal effect. The allegation in the plaint was that at the time of execution the plaintiff was of unsound mind and therefore incompetent to make a contract. In substance the plaintiff asked for a declaration of the void character of the document in question.

C. S. Venkatachariar and *D. Ramaswami Aiyangar* for Petitioner.

V. K. Mahadeva Sastri and *C. S. Rajappa* for Respondent.

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* C. R. P. No. 800 of 1937. 8th November, 1938.

Kayathan Roche v. Chinnayya Roche.

The Court delivered the following

JUDGMENT.—*Kattiya Pillai* v. *Ramaswamia Pillai*[1] and *Purayil Abdullah* v. *Subramanyan Pattar*[2] show that it is the substance of the relief claimed that must be looked to in questions of court-fee and jurisdiction. I certainly agree with the learned District Munsif, that plaintiff's real purpose in this suit is to get an adjudication on the sale deed to which he refers repeatedly in his plaint. The cases quoted against this view of the law, *Veerappa Chettiar* v. *Arunachalam Chetti*[3] and *Karaia Nachi Bivi* v. *Allapichai*[4], are clearly distinguishable—the former because in it there was no dispute apparent as to title, and the latter because it deals only with the need to assume the truth of the *facts* asserted in a plaint. In my opinion therefore the learned Subordinate Judge was wrong in his view that the plaint should be valued as if it were for an injunction and nothing else, and it is he and not the District Munsif who has jurisdiction. His order is therefore set aside, and the order of the learned District Munsif restored. Costs of this appeal and of the appeal in the Court of the Subordinate Judge to be paid by the respondent.

K.C. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW.

Lakshmipathi Naick .. *Appellant* (Prisoner—1st Accused).*

Lakshmipathi Naick, *In re.*

Explosive Substances Act (VI of 1908), Ss. 3 and 7—Prosecution for offence under S. 3—Sanction of Local Government—Order passed by His Excellency the Governor—Proof of consultation with ministers—Whether necessary.

Where a person was prosecuted for an offence under S. 3 of the Explosive Substances Act and the required consent under S. 7 of the Act was shown to have been granted by His Excellency the Governor and it was contended that as the order was made not only under S. 7 of the Explosive Substances Act but also under para. 8 of the India and Burma (Transitory Provisions) Order, 1937, the consent to the prosecution was given by His Excellency the Governor individually and not after consultation with the Ministers,

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1. (1929) 56 M.L.J. 394.
2. (1936) 71 M.L.J. 383: 43 L.W. 715.
3. (1935) 43 L.W. 334.
4. (1937) 1 M.L.J. 572: A.I.R. 1937 Mad. 402.

* Crl. Appeal No. 2 of 1938. 2nd August, 1938.

Lakshmipathi Naick, *In re.*

Held, that the Executive authority in the Province was vested in the Ministers and the question whether he consulted the Ministers or not in any particular matter was not a question that could be canvassed in a Court of law, and that the prosecution was not rendered invalid on that ground.

Appeal against the judgment of the Court of Session of the Ramnad Division at Madura dated 10th December, 1937, in case No. 99 of the calender for 1937.

Sadhu Ganapathi Pantulu, T. Nallasivan Pillai and *C. K. Venkatanarasimhan* for Appellant.

The Public Prosecutor (V. L. Ethiraj) on behalf of the Crown.

The Court delivered the following

JUDGMENT.—As many as ten persons were accused in the Court below and the charge in the case consisted of no less than seven counts. Only the appellant was convicted and that too under counts 2 and 3 alone and the remaining accused nine in number were acquitted and the other counts seven in number were found to be not established.

The conviction of the appellant is in respect of the alleged throwing of a bomb by him at the deceased Ayyappa Naicker at about 5 P.M. on the 22nd March, 1937, at Ettakkappatti. In respect of this act a charge of murder was framed against the appellant as well as a charge under S. 3 of the Explosive Substances Act and he was convicted under both the counts and given concurrent sentences of transportation for life under S. 302, Indian Penal Code, and S. 3 of the Explosive Substances Act. As regards the latter charge, that is, under S. 3 of the Explosive Substances Act, an objection was taken in the Court below and the same objection was repeated in appeal to the validity of the consent given to the prosecution under S. 7 of the Explosive Substances Act (VI of 1908) by the Government in Ex. R, which is the Government order on the point. It is contended that this order being one which purports to be made by His Excellency the Governor cannot be deemed to be an order of the local government. The argument is that as the order purports to be made not only under S. 7 of the Explosive Substances Act but also under para. 8 of the India and Burma (Transitory Provisions) Order, 1937, and it must be held that the consent to the prosecution was given by His Excellency the Governor individually and not after consultation with the Ministers. There is really no point in this objection so far as the alleged absence of consultation with the Ministers is concern-

Lakshmipathi Naick. *In re.*

ed. The Executive authority in the province is vested in the Governor, and the question whether he has consulted the Ministers or not in any particular matter is not a question that can be canvassed in Courts of law.

Another objection has been newly raised in the course of the argument in this appeal, namely, that under the Government of India (Adaptation of Indian Laws) 1937 the words, "local Government" which are found in S. 7 of the Explosive Substances Act (VI of 1908) have been omitted so that the section ought to read as if the consent of the Central Government is required. It is here that S. 8 of the India and Burma (Transitory Provisions) Order, 1937, is relied upon for the purpose of showing that during the transitory period (during which the order in question was passed) the authority of the Central Government can be exercised by the Government. It is however not necessary to deal with this point finally because even if the point is sound and the prosecution and trial under S. 3 of the Explosive Substances Act are deemed to have been invalid for want of valid sanction or consent, the fact remains that the appellant has been convicted of an offence under S. 302, Indian Penal Code, against which this technical objection cannot be urged. I shall therefore proceed at once to consider the merits of the appeal, that is to say, whether as a matter of fact it has been proved that the appellant did throw the bomb in question and cause the death of Ayyappa Naicker on the 22nd March, 1937. The evidence for the prosecution is extremely interested, the material witnesses being enemies of the appellant.

[His Lordship discussed the evidence and concluded :]

On the whole, therefore, the evidence connecting the appellant with the throwing of the bomb is so tainted and unreliable that it is impossible to act upon it, or to support the conviction. The guilt of the appellant was left, in such grave doubt by the unsatisfactory nature of the evidence against him that the proper course for the Court below ought to have been to have dealt with these charges against the appellant in the same way as it dealt with the other charges, namely, that they had not been satisfactorily established. The appeal is therefore allowed and the convictions and sentences are set aside and the appellant is acquitted. He should be released from jail unless he is liable to be detained for some other cause.

B.V.V. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Annamalai Chettiar .. *Appellant** (*Plaintiff*)

v.

Lakshmanan Chettiar .. *Respondent* (*Defendant*).

Annamalai Chettiar *v.* Lakshmanan Chettiar.

Insolvency—Effect of—Mortgage—Final decree for sale—Subsequent adjudication of mortgagor as an insolvent—Official Receiver not made a party in execution—Execution sale and purchase by a stranger in good faith—Subsequent sale of the same property by the Official Receiver—Purchaser from the Official Receiver gets title to the equity of redemption—Provincial Insolvency Act (1920), *S.* 51 (3) *if protects Execution purchaser.*

Where subsequent to the final decree and order for sale in a mortgage suit, the mortgagor is adjudicated as an insolvent, but owing to ignorance of the insolvency, the Official Receiver is not brought on the record in execution, and the property is bought by a *bona fide* purchaser, the purchaser does not get a good title to the equity of redemption as against the Official Receiver or a purchaser from him subsequent to the execution sale.

Raghunath Das v. *Sundar Das Khetri,* (1914) 27 M.L.J. 150: 41 I.A. 251: I.L.R. 42 Cal. 72 (P.C.) and *Kanchamalai Pathar* v. *Shahaji Rajah Sahib* (1935) 70 M.L.J. 162: I.L.R. 59 Mad 461 (F.B.), followed.

For this purpose, it does not make any difference that the decree is a mortgage decree and not a money decree as in the above cases.

Devaraja Aiyangar v. *Tirumalasami Naidu,* (1915) 32 I.C 489, followed.

The fact that the execution purchaser bought the property in good faith and without knowledge of the insolvency will not protect his purchase under S. 51 (3) of the Provincial Insolvency Act, as this provision has reference to a stage prior to the adjudication.

Mallikarjuna Rao v. *Official Receiver, Kistna,* (1938) 1 M.L.J. 471: I.L.R 1938 Mad. 1060, followed.

Appeal against the decree of the Court of the Subordinate Judge of Salem in A.S. No. 30 of 1934 (A. S. No. 55 of 1933 District Court, Salem) preferred against the decree of the Court of the District Munsif of Namakkal in O.S. No. 772 of 1931.

C.A. Seshagiri Sastri for Appellant.

T. M. Krishnaswami Aiyar and *A. Balasubramania Aiyar* for Respondent.

The Court delivered the following

JUDGMENT.—This appeal raises the question of the effect of the insolvency of the judgment-debtor under a mortgage decree, the adjudication taking place after orders had been passed for the sale of the hypotheca under the decree but before the sale

*S. A. No. 169 of 1935. 12th January, 1939.

Annamalai Chettiar v. Lakshmanan Chettiar.

was actually held. The appellant, who is the plaintiff, is a purchaser under a subsequent sale held by the Official Receiver. The following are the essential dates. The mortgage decree is dated 19th May, 1925. The judgment-debtor preferred his insolvency petition on 1st July, 1926. The sale under the mortgage decree was ordered on 8th July, 1927. The adjudication was on 26th July, 1927. On 7th September, 1927, the sale in execution of the mortgage decree was held without notice to the Official Receiver and the defendant purchased the property. On 31st January, 1930, the Official Receiver sold the property to the plaintiff subject to the mortgage upon which the decree was passed and the subsequent mortgage. The sale-deed was actually executed nearly a year later. The suit is one for possession on the basis of this sale from the Official Receiver, the plaintiff offering to redeem the mortgage on which the decree was passed if necessary. The first question is whether the respondent (purchaser under the mortgage decree) is protected by S. 51, sub-S. (3) of the Provincial Insolvency Act. On this question it seems that the matter is concluded by a bench decision reported in *Mallikarjuna Rao* v. *Official Receiver, Kistna*[1], the learned Judges reading S. 51 in the light of the heading "Effect of insolvency on antecedent transactions" and holding that it has no relation to transactions taking place after the adjudication. This decision dissents from an *obiter dictum* of Venkatasubba Rao, J., in a case reported in *Muthan Chettiar* v. *Venkituswami Naicken*[2]. I respectfully agree with the learned Judges of the bench that S. 51, sub-S. (3) does not apply to a purchase in execution after the adjudication which vests the property in the Official Receiver.

It has, however, been held by the lower appellate Court, relying on the cases reported in *Kondapalli Tatireddi* v. *Ramachandra Rao*[3] and *Subbaraya Goundan* v. *Virappa Chettiar Bank*[4] that the insolvent to whom notice went in the sale proceedings under the mortgage-decree at a time when the property still vested in him, represents the estate for the continuation of those proceedings and that therefore the sale would be good as against the Official Receiver even though no notice was given to the Official Receiver under O. 21,

1. (1938) 1 M.L.J. 471: I.L.R. 1938 Mad. 1060.
2. (1936) 71 M.L.J. 170: I.L.R. 59 Mad. 928.
3. (1921) 13 L.W. 616.
4. (1933) 65 M.L.J. 719 (F.B.).

r. 22, Civil Procedure Code. Both the cases upon which the learned Subordinate Judge relied are cases dealing with the power of an insolvent to continue proceedings connected with an application to set aside a sale in execution of the decree after his adjudication. In such cases there is no question of the property being vested in the Official Receiver, for until the sale is set aside there is nothing left to vest, and there is no particular reason why the insolvent, who was a party to the proceedings in the appeal stage, should not be allowed to continue them, subject presumably to the right of the Official Receiver to claim the property, if any, if the sale is set aside. There are, however, a number of specific decisions to the effect that when, after the execution proceedings have been started under the decree, the judgment-debtor is adjudicated as an insolvent, the sale cannot convey title to properties vested in the Official Receiver unless he is made a party to the proceedings. The leading case is the decision of the Privy Council in *Raghunath Das* v. *Sundar Das Khetri*1. That was a case of a money decree, the property in question having been attached before the adjudication and sold without impleading the Official Assignee after the adjudication. Their Lordships point out that

> "In the first place the property having passed to the Official Assignee, it was wrong to allow the sale to proceed at all. The judgment-creditors had no charge on the land, and the Court could not properly give them such a charge at the expense of the other creditors of the insolvents. In the second place no proper steps had been taken to bring the Official Assignee before the Court and obtain an order binding on him, and accordingly he was not bound by anything which was done. In the third place the judgment-debtors had at the time of the sale no right, title or interest which could be sold to, or vested in, a purchaser, and consequently the respondents acquired no title to the property."

It was pointed out for the respondent that this decision relates to a money decree and their Lordships expressly point out that there was nothing in the nature of a charge by reason of the attachment under that decree. It seems to me, however, that the fact that we are now dealing with a mortgage decree will not take away the applicability of this decision, though it will have a bearing upon the nature of the decree to be passed.

At the time when the sale in favour of the respondent was held, the mortgagee decree-holder had a charge over the property to the extent of his decree. In realisation of that charge he proceeded to sell the right, title and interest of the judgment-

1. (1914) 27 M.L.J. 150; L R. 41 I.A. 251: I.L.R 42 Cal. 72 (P.C.).

Annamalai Chettiar v. Lakshmanan Chettiar.

debtor to whom due notice was given. After the sale was ordered, by operation of law, the right, title and interest of the judgment-debtor, subject always to the decree-holder's charge, became vested in the Official Receiver. Adopting the reasoning of their Lordships of the Privy Council, when this sale was held there was no title vested in the judgment-debtor which could by the Court sale pass to the purchaser. At the same time the purchaser, having by payment to the mortgagee decree-holder liberated the property from the mortgage decree, certainly has an equity as against the judgment-debtor and as against the Official Receiver in whom the judgment-debtor's property had become vested to be reimbursed the amount which he has spent by his *bona fide* purchase to relieve the property of this burden. There is a decision of a bench of this Court reported in *Devaraja Aiyangar* v. *Tirumalasami Naidu*[1], wherein the rule laid down by the Privy Council in *Raghunath Das's case* has been applied to the case of a mortgage-decree. Mr. Krishnaswami Aiyar has sought to get over this ruling by describing it as an *obiter dictum*. I doubt whether this description is legitimate regarding a decision on one of the two points decided in a case, merely because the other point, which was taken up first, was itself sufficient to dispose of the case. The learned Judges discuss both the contentions and, in spite of having given a decision on the first contention which makes it unnecessary to decide the second contention, they do definitely give a decision on the question in which we are now interested, which was a question which arose for decision and would have been sufficient to dispose of the case if the decision on the first point had been otherwise. Such a decision cannot in my opinion, be correctly described as an *obiter dictum*. It seems to me in view of these authorities, that it is unnecessary to draw any analogy from the decision of the Full Bench to which I was a party, reported in *Kanchamalai Pathar* v. *Shahaji Rajah Sahib*[2], to the effect that when the judgment-debtor dies after the sale has been ordered and before the sale has been held, no title passes to the purchaser when there is no notice to the legal representatives of the judgment-debtor. The essential principle seems to me to be the same, namely, that the Court sale in

1. (1915) 32 I.C. 489.
2. (1935) 70 M.L.J. 162: I.L.R. 59 Mad. 461 (F.B.).

execution of a decree passes no title unless the person in whom at the time of the sale the title vests, is a party to the sale proceedings. In this view I disagree with the learned Subordinate Judge and hold that the plaintiff is entitled to recover possession of the property on reimbursing the purchaser under the mortgage decree the amount which he has paid to discharge that decree. The appeal is therefore allowed with costs here and in the lower appellate Court. The decree of the trial Court is restored and the respondent will be entitled to draw the amount in Court deposit if still available. There seems to me to be some doubt whether the amount deposited in Court is still in Court deposit after the lower appellate Court's judgment. If the amount has been withdrawn it should be re-deposited in the trial Court within one month and may then be drawn by the respondent.

Annamalai Chettiar v. Lakshmanan Chettiar.

Leave to appeal refused.

K. C. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Vadamalai Thiruvanatha Sevuga Pandia Thevar Avergal, Zamindar of Seitur .. *Appellant* (Plaintiff)*

v.

Kona Suna Ana Dorai Venkataraja and another .. *Respondents (Defendants).*

Zamindar of Seitur v. Dorai Venkataraja.

Madras Estates Land Act (IX of 1908), S. 151—Construction of building by tenant on agricultural land—Housing cattle—Whether the use of a small portion of suit land for other purposes impaired value—Grounds for eviction, whether made out.

The mere diversion of land from agriculture is not a ground for eviction, provided that that diversion does not by its nature impair the value of the land for future agriculture. If a ryot uses a portion of his holding as a cattle stand, he would not be using it for agriculture, but he would certainly not be impairing its fitness for agriculture.

The construction of a small building occupying something less than one-twentieth of a whole agricultural holding does not render that holding taken as a whole unfit for agricultural purposes.

Appeal against the decree of the District Court of Ramnad at Madura in A. S. No. 229 of 1932 (R.S. No. 1 of 1932, Sub-Collector's Court, Sivakasi Division).

* S. A. No. 851 of 1934. 13th October, 1938.

Zamindar of Seitur v. Dorai Venkataraja.

A. Swaminatha Aiyar and *S. Tyagaraja Aiyar* for Appellant.

K. S. Champagesa Aiyangar for Respondents.

The Court delivered the following

JUDGMENT.—The appellant—the landholder—sued to evict the respondent from his holding on the ground that with reference to the terms of S. 151 of the Madras Estates Land Act the tenant had materially impaired the value of the holding for agricultural purposes and rendered it substantially unfit for such purposes. The proved facts are that the contesting respondent purchased a holding of 41 cents, round which he built a wall apparently in substitution for an old mud wall which had previously existed, and in the northern half of the holding he constructed a small house and two cattle-sheds. The actual extent occupied by these buildings is said to be just under two cents out of the 41 cents of the holding. But it is contended that if one takes into consideration the area required for the ordinary use of these buildings, about one-fourth of the holding has been diverted from agricultural purposes. The rest of the land seems to be used for growing vegetables and fruit trees. Both the Courts below have found that the holding as a whole has not been rendered substantially unfit for the agriculture by the use to which it has been put by the contesting respondent. That is a finding of fact which binds me unless it can be shown that the Courts below have approached the question without regard to the proper legal criteria which must govern a decision on this point.

The Privy Council in the case of *Hari Mohun Misser* v. *Surendra Narayan Singh*[1], have observed that the matter must be decided with reference to the size of the holding, the area withdrawn from actual cultivation and the effect of such withdrawal upon the fitness of the holding as a whole for cultivation. The learned District Judge in the course of his judgment observes:

> "In all these cases the point that has to be decided is not what is the extent taken away from the holding for purposes of building. The point that should be decided in each case is whether the tenant has in any way rendered the holding substantially unfit for agricultural purposes."

The first sentence in the passage quoted, taken by itself, would appear to indicate that the learned District Judge

1. (1907) 17 M.L.J. 361 : L.R. 34 I.A. 133 : I.L.R. 34 Cal. 718 (P.C.).

Zamindar of Seitur v. Dorai Venkataraja.

regarded the extent occupied by the buildings as immaterial. But reading the judgment as a whole I have no doubt that he quite rightly takes into consideration the area occupied by the buildings in comparison with the area as a whole and considers whether the construction of those buildings has materially affected the fitness of the holding as a whole for agricultural purposes. That is what according to the Privy Council he should do.

I may observe that according to the contesting respondent's own evidence the house in question is a small house intended to be used as a farm house where he may stay when supervising the cultivation of his other holdings in the same estate, and where he can store grain. As to the cattle-sheds it might be argued that the building of a cattle-shed abstracts a certain area from cultivation and renders it unfit for agriculture. But I am of opinion that since the use of cattle is a necessary incident of agriculture, the occupation of a very small proportion of a holding for housing cattle cannot legitimately be treated as an occupation rendering the holding as a whole unfit for agricultural purposes. Similarly with regard to the storage of manure which appears to have been done on the land, so far from that rendering the land unfit for growing crops, it would in all probability make it much more fertile.

With reference to the argument that besides two cents occupied by buildings another 10 cents is diverted from agriculture by reason of the use of the buildings, I must observe that the mere diversion of land from agriculture is not a ground for eviction, provided that that diversion does not by its nature impair the value of the land for future agriculture. If a ryot uses a portion of his holding as a cattle-stand, he would not be using it for agriculture, but he would certainly not be impairing its fitness for agriculture. I do not think it can be said that the construction of this small house occupying as it does something less than one-twentieth of the whole holding renders that holding taken as a whole unfit for agricultural purposes. Nor do I think it can be said that the Courts below have adopted the wrong legal criteria in deciding the question which was before them.

The result therefore is that the appeal is dismissed with costs.

Leave to appeal is refused.

K. C. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VARADACHARIAR AND MR. JUSTICE GENTLE.

Kuncha Ramakrishnayya .. *Appellant** (*1st Plaintiff*)

v.

Kondamudi Sreeramulu and another .. *Respondents* (*Defendant and 2nd Plaintiff*).

Ramakrishnayya *v.* Sreeramulu.

Specific performance—Contract to sell—Failure of vendee to pay—A term lease by vendor to raise money for filing suit for specific performance—If itself a bar to suit—Readiness of vendor to perform—Meaning of—Alternative claim for damages—If sustainable.

A agreed to sell a piece of land to *B* for Rs. 9,000. He received Rs. 100 by way of advance and it was agreed that the balance should be paid within one month and the transaction completed. As the sale-deed was largely for discharge of debts of *A*, it was agreed that the balance remaining after payment of debts should be paid to the vendor before the Sub-Registrar at the time of registration. As a lease of the properties was then outstanding, the contract provided that possession should be delivered to the vendee only after the expiration of that lease. As for nearly a year, the sale-deed was not executed, *A* arranged to file a suit for specific performance and for that purpose raised Rs. 1,000 by a *muniguita* lease under which the transferee was to be in possession for twelve years to get the advance of Rs. 1,000 liquidated. *B* pleaded that by virtue of this *muniguita* lease, *A* had disabled himself from carrying out the contract and that therefore the suit must fail. *A* therefore got a release from the lessee giving up his rights under it but as the tenants on the land had raised crops on it, it was provided in the release deed that they should be allowed to harvest the crops during that season. *A* also claimed damages and *B* pleaded that if *A* had disentitled himself to claim specific performance by his own conduct, the claim for damages also cannot be sustained under S. 19 of Specific Relief Act and *Ardeshir H. Mama v. Flora Sassoon*, (1928) 55 M.L.J. 523: L.R. 55 I.A. 360: I.L.R. 52 Bom. 597 (P.C.).

Held, as regards the claim to damages that there is a distinction between a claim to damages on the footing that the contract had been broken by the defendant and the breach had been accepted by the plaintiff and a claim to damages as merely an alternative to a claim for specific performance as in this case. In such a case the claim to damages is not sustainable as an independent claim.

Ardeshir H. Mama v. Flora Sassoon, (1928) 55 M.L.J. 523: L.R. 55 I.A. 360: I.L.R. 52 Bom. 597 (P.C.), followed.

As for the other ground of unreadiness and incapacity to perform his part of contract,

Held, that the execution of *muniguita* lease cannot of itself be held to show that *A* was not ready and willing to perform the contract. If *A* entered into the transaction of *muniguita* lease showing an intention to abandon the

* Appeal No. 178 of 1935. 25th January, 1939.

contract or treat it as at an end, it may be he is not entitled to specific performance. But otherwise the question will be one of fact whether by such transaction he has incapacitated or disabled himself and therefore evidence must be taken to decide the question.

Rama-krishnayya v. Sreeramulu.

Appeal against the decree of the Court of the Subordinate Judge of Tenali in Original Suit No. 51 of 1932.

V. Subramaniam for Appellant.

V. Govindarajachari for Respondents.

The judgment of the Court was delivered by

Varada-chariar, J.

Varadachariar, J.—This appeal arises out of a suit for specific performance, instituted by a vendor and his son. The son who is the second plaintiff may be ignored for the purpose of this appeal and the vendor referred to as the plaintiff. The contract, evidenced by Ex. I, was entered into on 26th January, 1930. The plaintiff thereby agreed to sell 7 acres 74 cents of land to the defendant for a sum of about Rs. 9,000. He received Rs. 100 by way of advance and it was agreed that the balance should be paid within one month and the transaction completed. As the sale-price was mainly intended to be utilised by the vendor in discharge of his debts, it was agreed that such balance as might remain after the debts had been discharged should be paid before the Sub-Registrar at the time of the registration of the sale-deed. As a lease of the land was then outstanding, Ex. I finally provided that possession should be delivered to the vendee on the expiry of the term of that lease. For almost a year after the date of Ex. I, the sale was not completed, and in January, 1931, notices (Exs. A and B) passed between the parties wherein each accused the other of default in carrying out the contract. The defendant also alleged in his reply (Ex. B) that the plaintiff had consented to give up the contract but was now trying to revive his claim under it.

This suit was instituted on 26th August, 1932, after a preliminary attempt by the plaintiff to sue *in forma pauperis* had failed. As usual, the plaint alleged that the plaintiff was ready and willing to perform his part of the contract. The defendant raised a number of defences; of which it is sufficient at this stage to refer to one founded upon Ex. II. This is a document executed by the plaintiff on 4th August, 1932, in favour of his son-in-law, for the purpose of raising a sum of Rs. 1,000 stated to be required to enable the plaintiff to file a suit for specific performance in respect of the suit contract.

Rama-krishnayya v. Sreeramulu.

Varada-chariar, J.

The document is described as a *muniguita* lease under which the transferee was to remain in possession of the suit property for a period of twelve years from fasli 1342 to the end of fasli 1353 and thereby get his advance of Rs. 1,000 liquidated. The defendant contended that by the execution of this document in respect of the suit property, the plaintiff had disabled himself from carrying out his part of the contract and that the suit should accordingly be dismissed. By way of rejoinder, the plaintiff alleged that Ex. II had been executed on the understanding that the transferee under Ex. II should give up possession whenever the plaintiff so required with a view to enable him to deliver possession to the defendant. Before the suit came on for final disposal, the plaintiff had also obtained from the transferee under Ex. II a deed of release, marked Ex. C in the case, on the 14th August, 1933. This recited the prior agreement between the parties and stated that the executant had thereby given up his rights under Ex. II and shall thereafter have nothing to do with the land. It, however, contained a clause at the end that as certain cultivators had then raised crops on the land, they should be allowed to harvest those crops at the harvest season. With reference to this contention and the allegations bearing thereon on both sides, the lower Court framed the third issue, namely, whether the plaintiff disabled himself by the date of suit from performing his part of the contract.

During the pendency of the suit, the plaintiff amended the plaint by including an alternative claim for damages. In answer to this claim, it was contended on behalf of the defendant that if the plaintiff had disentitled himself to claim specific performance by his own conduct, the claim for damages could not be sustained under S. 19 of the Specific Relief Act, in view of the decision of the Judicial Committee in *Ardeshir H. Mama* v. *Flora Sassoon*[1]. It was also contended that the claim for damages, if regarded as an independent claim, was barred by limitation, as more than three years had elapsed from the date of the breach of contract, before the amendment was made. These questions relating to the claim for damages form the subject-matter of issues 9 and 10. The eighth issue is substantially the same as the third issue for our present purpose.

1. (1928) 55 M.L.J. 523: L.R. 55 I.A. 360: I L.R. 52 Bom. 597 (P,C.).

Rama-krishnayya v. Sreeramulu.

Varada-chariar, J.

The lower Court dealt with issues 3, 8, 9 and 10 as preliminary issues, after marking Exs. A, B and C and Exs. I and II. It was of opinion that the decision in *Ardeshir H. Mama* v. *Flora Sassoon*[1], disentitled the plaintiff to claim specific performance after he had executed Ex. II. It also followed on that view that the claim for damages was unsustainable. The learned Subordinate Judge further held that the claim for damages was barred by limitation. He accordingly dismissed the suit. Hence this appeal by the plaintiff.

The claim for damages may be briefly dealt with. In *Ardeshir H. Mama* v. *Flora Sassoon*[1], their Lordships of the Judicial Committee have emphasised the distinction between a claim for damages on the footing that the contract had been broken by the defendant and that the breach had been accepted by the plaintiff and a claim for damages as merely an alternative to a claim for specific performance. They have pointed out that in the latter case plaintiff affirms the existence of the contract even at the date of the suit and it will not be open to him in such a case to fall back upon what they refer to as the common law claim for damages on the footing of a breach of contract already committed by the defendant. In the present case, the plaintiff clearly elected to treat the contract as in force notwithstanding the defendant's default and the lower Court was accordingly right in holding that the plaintiff's claim for damages was not sustainable as an independent claim. The same decision is also authority for holding that the award of damages under S. 19 of the Specific Relief Act cannot be claimed by a plaintiff who by his own conduct has disentitled himself to claim specific performance. In this view, it is unnecessary to deal with the question of limitation, because if the claim for damages has to be considered only under S. 19 of the Specific Relief Act, no bar of limitation will arise in the case, as a suit for specific performance had been instituted in time. The only question therefore for decision in the appeal is that raised by the third issue in the case, namely, whether the plaintiff has disabled himself from performing his part of the contract.

1. (1928) 55 M.L.J 523: L R 55 I.A. 360: I.L.R. 52 Bom. 597 (P.C.).

Ramakrishnayya v. Sreeramulu.

Varadachariar, J.

We are unable to concur in the decision of the lower Court on the third issue. It is true that in a suit for specific performance, the plaintiff must always be ready and willing to carry out his part of the contract. We do not think that the execution of Ex. II can of itself be held to show that the plaintiff was not ready and willing. A transaction whereby a vendor disposes of the subject-matter of the contract in violation of the contract has a two-fold significance: (1) as showing an intention on his part to treat the contract as at an end or to abandon the contract and (2) as bearing on the question of his capacity to perform the contract. Where subsequently to the contract the vendor sells away the subject-matter of the contract to a third party, the Court will be justified in drawing both the inferences above indicated, namely, that he had thereby shown his intention to abandon the contract so far as specific performance thereof was concerned and also disabled himself from performing the contract in the sense of conveying the property to the original vendee. As explained in *Hipgrave* v. *Case*[1] and in *Ardeshir H. Mama* v. *Flora Sassoon*[2], such a disposition of the property by the vendor might not disentitle him to claim damages as on a breach of contract, if prior to such disposition the vendee had broken his contract; because it is recognised that on repudiation by the vendee, the vendor is entitled to treat the contract as at an end without foregoing his right to claim damages. Where, however, the subsequent transaction entered into by him is not in the nature of a *sale* of the subject-matter of the contract and there is nothing to show that he intended to abandon the contract or to treat it as at an end, the question whether by such transaction he has incapacitated or disabled himself from performing his part of the contract will be a question of fact, to be determined in the light of several considerations. To take an extreme case, a vendor may, pending a suit for specific performance, be obliged to lease the property, say, for a year. It seems to us it will be too much to conclude from this that the vendor has either shown an intention to abandon the contract or disabled himself from performing the contract. We can see no justification for holding that a vendor in that position must keep the property waste or cultivate it himself and lease it even for a short term only at

1. (1885) 28 Ch. D. 356.
2. (1928) 55 M.L.J. 523: L.R. 55 I.A. 360: I.L.R. 52 Bom, 597 (P.C).

his peril. If on the other hand the term of the lease or the nature of the transaction was such that it would be impossible for the vendor to be able to carry out his obligations even when the time arrived for his delivering possession to the vendee when he succeeded in his suit for specific performance, it might well be treated as a case where the vendor had disabled himself from carrying out his part of the contract. It does not seem to us right in all cases to take the state of things as on the date of the institution of the suit as conclusive proof that the vendor has incapacitated himself.

In the present case, Ex. II is no doubt for a term of 12 years. If, for instance, the allegation were true, that even when Ex. II was executed it was the understanding between the parties to Ex. II that the transferee should put the vendor back in possession whenever he wanted to enable him to deliver possession to the vendee, it would be difficult to say that the vendor by the mere execution of Ex. II had disabled himself from carrying out his contract with the vendee. Again, if as appears from Ex. C, the vendor has obtained a release from the transferee under Ex. II in sufficient time to enable him to put the vendee in possession the moment his obligation to deliver possession arises, it does not seem to us right to hold that the vendor has disabled himself either. No evidence having been recorded, we cannot say whether Ex. C has really put the vendor in a position to carry out his obligation under the contract of sale. It must be remembered in this connection, that under the Transfer of Property Act as also under the general law as stated in the passages quoted by the learned Subordinate Judge from Halsbury's Laws of England, the vendor's obligation to deliver possession arises only when the purchase money is paid by the vendee and the document of sale is executed by the vendor. It is with reference to these considerations that the question of the vendor's ability to carry out the several obligations imposed upon him by law as vendor must be determined. Where, for instance, he has made it impossible for himself even to convey the property with good title, the position might be different. But where the alleged incapacity related only to one or another of the several obligations of the vendor under the contract, it will be a question to be determined in each case whether or not the vendor is in a position to perform that particular obligation at

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the time when under the law he is bound to perform it. Dealing with the case in the light of these considerations, we cannot uphold the finding recorded by the lower Court on the third issue, merely on the information furnished by the documents Exs. II and C. When the case goes back to be dealt with on the merits, it will be for the Court to determine in the light of the materials that may be placed before it, whether in respect of the several obligations which the vendor has to fulfil, he is or is not in a position to carry out the same in due time. We will only add that the mere provision in Ex. C that the cultivators who had then raised crops on the land should be permitted to harvest those crops cannot be treated as disabling the vendor from delivering possession to the vendee in due course, because till the execution of the sale deed, the vendee will not in law be entitled to the rents and profits accruing on the land and whoever has raised the crops will be entitled to harvest them independently of the question of transfer of possession by the vendor to the vendee.

It seems to us necessary in this connection to say a word about a passage quoted by the learned Subordinate Judge from Asburner's Principles of Equity (at page 398 of the 2nd edition). It is there observed that

> "If *A* agrees to convey land to *B* at a future date and before that date conveys the land to a third person, *A* commits an anticipatory breach of his agreement; *B* can repudiate it It is immaterial that *A* might, by repurchasing the land before the date fixed, recapacitate himself to perform his contract with *B*."

The learned Judge treats this dictum as conclusive against the plaintiff in this case. This does not seem to us to be a correct application of the passage quoted. In the context in which it occurs, the passage relates to the right of the other party to the contract to treat an anticipatory breach as putting an end to the contract; and all that the passage lays down is that in the event of an anticipatory breach by one party, the other party cannot be prevented from treating the contract as at an end merely on the ground of the possibility that the party who has broken the contract by selling away the subject-matter of the contract may subsequently re-acquire it. As we have already pointed out, there is a substantial difference between the effect of a sale and the effect of other kinds of disposition, for the purposes of the decision of the question now before us.

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That the plaintiff had no intention of breaking or abandoning the suit contract when he entered into Ex. II is made clear by the fact that Ex. II specifically recites his intention to sue for specific performance of the contract and purports to raise money for the expenses of the litigation. We do not suggest that if as a matter of law the execution of Ex. II would of itself have sufficed to deprive the plaintiff of his right to claim specific performance his intention can help him. But in so far as the authorities lay stress upon the readiness and willingness of the vendor to carry out his contract and upon the absence of any conduct indicating an intention to abandon or repudiate the contract, this circumstance is of importance. We may also add that the fact that the plaintiff was probably led into executing Ex. II by the observations made by the Court when dismissing his petition to sue *in forma pauperis* is also not without significance in this connection. The order of the Court seemed to imply that it was open to the plaintiff to raise money on the security of the suit property itself. We are doubtful if that was a correct view; but whether correct or not, there can be little doubt that it must have led the plaintiff to enter into this transaction, to raise money for the expenses of the litigation.

It is thus clear that there has been no repudiation or abandonment of the contract by the plaintiff nor any breach nor any circumstance which must necessarily be held to have incapacitated him from performing his obligations under the contract. The decree of the lower Court is accordingly set aside and the case remanded for trial of all the issues (except 9 and 10) on the merits. The third issue must be dealt with as a question of fact, in light of the observations already made. We have dealt with the case only on the materials placed before the lower Court at the hearing of the suit. The parties will be at liberty to adduce evidence of all other relevant facts, when the case comes to be dealt with by the lower Court after remand.

The appellant will be entitled to the costs of this appeal from the first respondent. As the appeal has been filed *in forma pauperis*, there will be no direction either for payment of the court-fee payable on the memorandum of appeal or for its refund under S. 13 of the Court-Fees Act.

S. V. V. — *Appeal allowed and case remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW.

Karuppiah Thevan and another .. *Petitioners** (*Accused 1 and 2*)

v.

N. Krishna Pillai .. *Respondent* (*Complainant*).

Karuppiah Thevan v. Krishna Pillai.

Madras Local Boards Act (XIV of 1920 as amended), S. 227 A—Members of Panchayat Board—Snatching away minutes book at meeting—Prosecution for offence—Sanction of local Government—Whether necessary.

Where the accused, who were members of a Panchayat Board, were charged with the offence of having snatched away the minutes book from the member who was presiding at the meeting of the Board apparently with a view to prevent him from making an entry therein, and the complaint referred to the official character of the various acts and occurrences that took place leading to the occurrence,

Held, that the acts constituting the offence were done by the members acting in their official capacity and that the Magistrate could not take cognizance of the offence in the absence of sanction of the prosecution by the Government.

Satyanarayana v. *Venkanna*, (1935) M.W.N. 1033, referred to.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Stationary Second Class Magistrate, Uthamapalayam, dated 15th September, 1938, in C.C. No. 441 of 1938.

V. T. Rangaswamy Aiyangar and *V. S. Ramaswamy Aiyar* for Petitioners.

N. Somasundaram for Respondent.

K. Venkataraghavachari for *The Public Prosecutor* (*V. L. Ethiraj*) for the Crown.

The Court made the following

ORDER.—The offence alleged in this case is similar to the one that was the subject-matter of Crl. R.C. No. 389 of 1935, disposed of by K. S. Menon, J., namely, *Satyanarayana* v. *Venkanna*[1], the offence being the snatching away of the minutes book by a member of a Panchayat Board from the member who was presiding at the meeting apparently with a view to prevent him from making an entry therein which was objected to. Both the accused in the case are members and one is charged with having instigated the other to snatch away the minutes book.

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* Crl. R.C. No. 744 of 1938. Crl. R.P. No. 707 of 1938. 5th January, 1939.

1. (1935) M.W.N. 1033.

Karuppiah Thevan v. Krishna Pillai.

A reading of the complaint shows that from the beginning to the end reference is made to the official character of the various acts and occurrences that took place leading up to the snatching away of the minutes book. It may be that the snatching away of the minutes book is not a part of the official duties of a member of the Panchayat Board, but the question for decision is not whether the particular act alleged was within the jurisdiction or competence of the Board but whether the act was done while he purported to act in discharge of his duties and whether the act can be reasonably related to the official character of the person who did it as in this case. It must be deemed to be an act done when purporting to act in his official capacity as a member. Otherwise it would mean that only in the case of authorised acts, which of course cannot amount to an offence, the prosecution would require the sanction of the local Government, thus making the provision of law, S. 227-A of the Madras Local Boards Act, unnecessary. Where the act is one which is strictly within the limits of one's official competence, no offence would be disclosed and it cannot therefore call for the exercise of any power of sanction on the part of the Government for prosecution. Taking a reasonable view of the facts alleged in this case it appears to me that this is a case in which the Magistrate was not entitled to take cognizance of the offence charged against the accused who are members of the Panchayat Board in the absence of any sanction of the prosecution by the Government. The proceedings before the Magistrate are therefore quashed. It will of course be open to the complainant in the case to obtain sanction of the Government and to file a fresh complaint if so advised.

B.V.V. ——— *Proceedings quashed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN AND MR. JUSTICE STODART.

Vadavalli Narasimha Rao and others .. *Petitioners** (*Accused*)

v.

V. Ayyanna Rao .. *Respondent* (*Complainant*).

Narasimha Rao v. Ayyanna Rao.

Indian Penal Code (*XLV of* 1860), *S.* 430—*Requirements for completion of offence.*

When the facts were clear that the accused did commit mischief by putting a bund across a channel which resulted in diminishing the supply of

* Crl. R. C. No. 327 of 1938, Crl. R. P. No. 312 of 1938. 7th December, 1938.

Narasimha Rao v. Ayyanna Rao.

water which would otherwise have been available to the complainant for agricultural purposes,

Held, that all the requirements of the offence under S. 430, Indian Penal Code, were present.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Sub-Divisional Magistrate of Ellore in Criminal Appeal No. 7 of 1938 preferred against the judgment of the Court of the Stationary Sub-Magistrate of Ellore in C. C. No. 751 of 1937.

V. Suryanarayana for Petitioners.

B. Jagannadha Das and *M. Sriramamurthi* for Respondent.

K. Venkataraghavachari for *The Public Prosecutor* (*V. L. Ethiraj*) on behalf of the Crown.

The Court made the following

Burn, J.

ORDER. *Burn, J.*—The petitioners were convicted by the Stationary Sub-Magistrate, Ellore, of an offence under S. 430, Indian Penal Code, and sentenced to pay a fine of Rs. 50 each. On appeal the Sub-Divisional Magistrate, Ellore, confirmed the conviction but reduced the fine to Rs. 25 each. This revision petition is preferred by the accused, who contend that the conviction under S. 430, Indian Penal Code, was wrong.

The facts are simple. The accused hold lands under a tank which receives its supply from a channel called the Dendulur channel. The complainant in this case was the holder of land irrigated from another tank which also receives its supply from the same channel, but the supply channel to the accused's tank takes off from the main channel at a point higher up than the supply channel of the complainant's tank. In these circumstances on the 2nd August, 1937, the accused put a bund across the main channel just below the point at which the supply channel to their tank takes off, and thereby diverted all the water flowing in the main channel to their tank, preventing any water from going down to the complainant's tank. The bund was kept in position for at least a month and a half. There is evidence that the complainant's paddy crop which had been transplanted by that time withered over an extent of 15 acres and the rest of the crop was slightly affected. The accused set up a mamool by which they were entitled to bund up the main channel whenever it was 'necessary' to take water to their

tank, or, in other words, whenever it pleased then to do so. The learned Sub-Magistrate found that by putting up this cross-bund the supply of water to the complainant's tank was diminished and that the complainant had incurred a loss which was estimated at about 150 bags of paddy. He also held that the accused had not established their right to put up the cross-bund in the main channel. The learned Sub-Divisional Magistrate confirmed these findings but considered that the extent of the damage to the complainant's lands appeared to be exaggerated. On this ground he reduced the fines.

It is urged for the accused that their act does not amount to an offence under S. 430, Indian Penal Code, because they used the water for agricultural purposes and there was no diminution of the supply available for agricultural purposes. Reliance is placed upon a judgment of mine in Crl. R. C. No. 568 of 1937 (not reported). In that case I held that the bunding up of the channel was on the findings an act of mischief because the utility of the channel as such was thereby destroyed. I have held that it was not on the findings possible to hold that an offence under S. 430, Indian Penal Code, had been committed, because the act of bunding up the channel did not and could not cause any diminution of the supply of water for agricultural purposes and the quantity of water available for agricultural purposes was unaffected. I therefore altered the conviction to one under S. 426. That decision, in my opinion, was wrong. It was not brought to my notice that a Full Bench of this Court so long ago as 1876 (*Ramakrishna Chetti* v. *Palaniyandi Kudambar*[1]) held that it is no part of the definition of the offence of causing a diminution of water-supply for agricultural purposes that the act of the accused should be an act of wanton waste. The principle upon which my judgment in the Revision Case referred to was based, was that unless water was *wasted*, the offence would not be one under S. 430. But in the light of the judgment in *Ramakrishna Chetti* v. *Palaniyandi Kudambar*[1], it is clear that that was wrong. It is sufficient for the purposes of S. 430 that the supply of water available *for a particular person* or class of persons should be diminished by the act of the accused. There is no doubt about the fact that the act of the accused in throwing a bund across

1. (1876) I.L.R. 1 Mad. 262 (F.B.).

Narasimha Rao v. Ayyanna Rao.

Burn, J.

the main supply channel was an act of mischief, since that completely destroyed the channel, from the complainant's point of view, rendering it useless as a supply channel. This has been held by myself in the case of *Vadlapatla Nariah* v. *Chelsani Narasayya*[1] and there are many other cases in which the same proposition has been stated. It is too obvious to need any authority.

The learned Counsel for the accused relies on *the case of Vattu Karan*[2], in which it was held that a diversion of the water of a channel not exclusively appropriated to the use of another did not constitute an offence under S. 430, Indian Penal Code. But that case is clearly distinguishable because it appears from the judgment that there was no evidence of loss having been sustained by the complainant nor was it the intent of the defendants to cause loss. A case tending in the opposite direction is reported on the same page of the 1st Vol. of Weir's Ruling p. 507, *the case of Ayyanna Gowd*. In that case the second class Magistrate convicted the accused under S. 430, Indian Penal Code, for opening without permission the sluice of a channel in order to take water to his field. The case was referred by the District Magistrate to the High Court on the ground that the accused had not effected any such change in the situation of the water as diminished its utility. He therefore requested the High Court to quash the conviction. The High Court after calling for a report on the point whether the accused was entitled to receive the water he took and whether in taking it he diminished the quantity of water to which another person was entitled, found that the accused was not entitled to the water he took and that his act in diverting it had lessened the quantity which the other ryots were entitled to receive for agricultural purposes. They therefore upheld the conviction under S. 430, Indian Penal Code. That was a much stronger case than the present one because the act of opening the sluice was not in itself an act of mischief. The utility of the sluice was not impaired in any way and the only ground upon which the act was held to be an act of mischief was that it reduced the quantity of water available *for the other ryots*.

The water was used by the accused for agricultural purposes, but nevertheless the conviction under S. 430, Indian

1. (1933) M.W.N. 427. 2. (1881) 1 Weir 507.

Narasimha Rao v. Ayyanna Rao. — Burn, J.

Penal Code, was confirmed. A similar case—*the case of Nalla Narayanaswami* is reported on page 504 of the 1st Vol. of Weir's Rulings. The appellant there placed a dam or obstruction across an irrigation channel and thereby diverted the water passing along the channel into his own fields, whereby the supply of water to the fields of others entitled thereto on a lower level was diminished. The appellate Court quashed the conviction on the strength of the decision reported in Vol. VII, M.H.C.R. Rulings p. xxxix. This Court held that that decision had been over-ruled by the Full Bench in *Ramakrishna Chetti* v. *Palaniyandi Kudambari*[1] and the acquittal was therefore set aside and the appellate Court directed to rehear the appeal with reference to the observations in *Ramakrishna Chetti* v. *Palaniyandi Kudambari* and in Criminal Revision Case No. 479 of 1884. The learned Counsel for the accused relies strongly upon the case reported on p. xv in M.H.C.R. Rulings, Vol. IV, under date 22nd October, 1868. In that case the accused had erected a dam across the bed of a river and the charge against them was that they knew that their act was likely to cause an inundation over the lands of the prosecutor's village Poonavayal. The prisoners admitted the erection of the dam but claimed to do so as of right and by long custom. It was found that this did not amount to an offence under S. 432, Indian Penal Code. This case clearly has no direct relevance to the present one. The learned Counsel relies upon the observations of the majority of the Court on page xvii. Their Lordships there stated:

> "In the present case the act done was the erecting of a dam which certainly did not cause the destruction of any property, etc. It was the alleged probable consequential damage to other property which was the cause of complaint and though that would authorise increased punishment under S. 432 it would not of itself constitute mischief."

On this ground the convictions were held to be illegal and were quashed. We think it is clear that that case has no bearing upon the present one; it was a case in which the complainant's grievance was that his lands had been flooded by the putting up of a dam across the river. It has no bearing upon the question of deprivation of water by putting a bund across a supply channel. Learned counsel for the accused relies also

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1. (1876) I.L.R. 1 Mad. 262 (F.B.).

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Burn, J.

upon the case of *Kullappa Naicker* v. *Palaniammal*[1]. That was a case in which the accused cut open a bund and the complainant alleged that the supply of water to her fields had been thereby diminished. The findings, however, were that the accused had been in the habit of getting a permit to take water to his fields through a similar opening in the bund and that in the year in question he had applied to the village munsif for a permit and had cut the bund in anticipation of grant of the permit. On these facts the learned Judges held that the accused was justified in believing the village munsiff would grant him the permit as was done in the previous years. They therefore held that this act was done in the *bona fide* belief that he would obtain a permit. They also found (on p. 149) that

> "Assuming that the bund did not belong to the complainant, by the mere diminution of water-supply, there has been no destruction or diminution in value or utility of the property on which the injurious act was committed by the accused."

The learned Judges then made a reference to the case reported in 4 M.H.C.R. Rulings, but the terms in which they refer to that case would seem to indicate—I say it with all respect—that the Judges had not the decision before them. They observe:

> "It was pointed out in 4 M.H.C.R. Rulings xv that unless the property itself was injured, the mere putting up of a dam at a particular place which resulted in depriving the complainant of the water-supply would not amount to mischief under S. 430."

As I have already noticed, the case in 4 M.H.C.R. Rulings xv was a case not of depriving the complainant of water-supply but of flooding his lands by the unauthorised erection of a dam.

The conviction in this case is well supported by the decision in *Chidambaram Pillai* v. *Muhammad Khan Sahib*[2]. That was a case which is almost converse to the present case. The accused, it is stated in the headnote, entered on the lands of the complainant and cut three bunds which had been erected in a channel which ran through the complainant's land with the result that the water in that channel ran down another channel off the complainant's land and was utilised by the accused for sale to ryots holding lands lower down. The conviction under

1. (1919) 11 L.W. 148. 2. (1918) 34 M.L.J. 206.

S. 430, Indian Penal Code, was conferred on the ground that the supply of water available for agricultural purposes of the complainant was diminished. Reference was made to the Full Bench decision in *Ramakrishna Chetti* v. *Palaniyandi Kudambar*[1].

Narasimha Rao v. Ayyanna Rao. — Burn, J.

It is not necessary in my opinion to refer to the other cases which have been quoted before us. The facts are clear that the accused did commit mischief by putting a bund across the channel. This resulted in diminishing the supply of water which would otherwise have been available to the complainant for agricultural purposes. All the requirements of the offence under S. 430, Indian Penal Code, are present. The convictions of the accused are correct and the fines cannot be said to be excessive. This petition is dismissed.

Stodart, J.—I agree and have nothing to add. Stodart, J.

K.C. —— *Petition dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Civil Jurisdiction.]

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE MADHAVAN NAIR AND MR. JUSTICE VARADACHARIAR.

Gunda Subbayya .. *Petitioner**

v.

The Commissioner of Income-tax, Madras .. *Respondent.*

F.B. — Gunda Subbayya v. Commissioner of Income-tax, Madras.

Income-tax Act (XI of 1922), Ss. 13, 23 (3) and (4)—Assessee's evidence not reliable—Whether Income-tax Officer can make assessment to the best of his judgment—Procedure—Desirability of Income-tax Officer disclosing to assessee and indicating in his order the material on which he has made the assessment.

Where in a case falling under S. 23(3) of the Income-tax Act the assessee has failed to produce evidence on which the Income-tax Officer can make a proper assessment of the assessee's Income, the income-tax Officer must himself take steps to procure material for the purpose, if it is not already in his possession. He has power under S. 37 to call witnesses and he can make his own inquiries. When he has material on which he can assess, he must consider it and make an assessment to the best of his judgment. The only difference between an assessment under sub-S. (3) of S. 23 in a case where there is evidence on which the Income-tax Officer can base a finding that the assessee's books are unreliable and consequently neglects them and the

1. (1876) I.L.R. 1 Mad. 262 (F.B.).

* O. P. No. 126 of 1937. 27th October, 1938.

F.B.

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assessee fails to produce other evidence, and an assessment under sub-S. (4) is that the Act contemplates a more summary method when the Income-tax Officer is acting under sub-S. (4) and this is by reason of the deliberate default of the assessee.

Commissioner of Income-tax, Bihar and Orissa v. *Maharajadhiraj of Darbhanga*, (1933) 64 M.L.J. 612: L.R. 60 I.A. 146: I.L.R. 12 Pat. 318 (P.C.), referred to.

There is nothing in the Act itself which requires the Income-tax Officer to disclose to the assessee the material on which he proposes to act or refer to it in his order but natural justice demands that he should draw the assessee's attention to it before making the order. Information which the Income-tax Officer has received may not always be accurate and it is only fair when he proposes to act on material which he has obtained from an outside source, that he should give the assessee an opportunity of showing, if he can, that the Income-tax Officer has been misinformed, but the Income-tax Officer is obviously not bound to disclose the source of his information. S. 13 of the Act adds nothing to and takes nothing away from S. 23 (3).

Case stated by the Commissioner of Income-tax, Madras, under S. 66 (3) of the Income-tax Act, 1922.

S. Venkatesa Aiyangar and *B. S. Ram Mohan* for the Assessee, Petitioner.

M. Patanjali Sastri for the Commissioner, Respondent.

The judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—In accordance with the direction of the Court given under S. 66 (3) of the Indian Income-tax Act the Commissioner of Income-tax has referred the following question for the Court's decision:

"When there is evidence on which the Income-tax Officer can base a finding that the assessee's books are unreliable and consequently rejects them and the assessee fails to produce other evidence, can the Income-tax Officer assess under S. 23 (3) of the Act to the best of his judgment?"

The words 'to the best of his judgment' are used only in sub-S. (4), which requires the Income-tax Officer to make the assessment to the best of his judgment when there has been a default of the nature contemplated by the sub-section. Sub-S. (3) directs the Income-tax Officer to make the assessment after hearing such evidence as the assessee may produce and such other evidence as the Income-tax Officer may require him to produce on specified points. No direction is given to the Income-tax Officer when assessing under sub-S. (3) and the assessee fails to produce evidence or produces evidence which the Income-tax Officer considers unreliable or incomplete. The question is whether in such a case the Income-tax Officer should

proceed to assess as he would do in a case falling under sub-S. (4).

The provisions of the two sub-sections have been frequently debated in the Courts, but it is not necessary for the purpose of deciding the question referred to enter upon a discussion of the reported cases. When assessing under either of the two sub-sections the Income-tax Officer must have material on which to base his assessment. An order of assessment made under sub-S. (3) is appealable, whereas an order made under sub-S. (4) is not, but this does not mean that the Income-tax Officer can make an assessment under sub-S. (4) capriciously. The assessment must be to the best of his judgment, and the word 'judgment' itself implies consideration of something. Here it must be the consideration of facts relating to the income of the assessee. And the same principle applies when the Income-tax Officer is acting under sub-S. (3). Where in a case falling under that sub-section the assessee has failed to produce evidence on which the Income-tax Officer can make a proper assessment of the assessee's income, the Income-tax Officer must himself take steps to procure material for the purpose if it is not already in his possession. He has power under S. 37 to call witnesses and he can make his own inquiries. When he has material on which he can assess, he must consider it and make an assessment to the best of his judgment. I use the word 'material' advisedly because the Income-tax Officer is not confined to what would be evidence in a Court of law. The only difference between an assessment under sub-S. (3) in a case like the one mentioned in the reference and an assessment under sub-S. (4) is that the Act contemplates a more summary method when the Income-tax Officer is acting under sub-S. (4) and this is by reason of the deliberate default of the assessee.

The interpretation to be placed on sub-S. (3) is to be gathered from the judgment of the Privy Council in the case of *Commissioner of Income-tax, Bihar and Orissa* v. *Maharajadhiraj of Darbhanga*[1]. In that case the assessee stated that he had an income of Rs. 4,364 from a certain source. The Income-tax Officer did not accept this figure, and passed an order assessing him on an income from this particular source

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1. (1933) 64 M.L.J. 612: L.R. 60 I.A. 146: I.L.R. 12 Pat. 318 (P.C.).

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of Rs. 1,04,364. In due course the Commissioner of Income-tax referred the following question to the Patna High Court for its decision:

"Whether the assessing officer was right in making an estimate of Rs. 1,04,364 under this head as he has done?"

The High Court answered this question in the affirmative and Terrell, C.J., in the course of his judgment observed:

"Learned counsel for the assessee has argued that the officer is not entitled to make a guess without evidence and I agree with that contention, but in this case the state of affairs in the previous years, coupled with the fact that the assessee had a large mortgage loan business and must have enforced mortgages by sale on many occasions, afford ample material for the assessment made."

The other Judges concurred and the Privy Council also agreed:

"Adding only that, if the assessee wished to displace the taxing officer's estimate, it was open to him to adduce evidence of all his purchase transactions during the year and of the financial results thereof, which he apparently made no attempt to do."

The Income-tax Officer had assessed the assessee to the best of his judgment on the material before him and the material was sufficient for the purpose.

There are two other questions which are bound up with the question under discussion, namely, whether the Income-tax Officer when making an assessment on material which he himself has gathered shall disclose it to the assessee before making his assessment and give him an opportunity to adduce material in rebuttal and whether the Income-tax Officer should in his order of assessment set out the facts which he has taken into consideration when estimating the assessee's income for the year. There is nothing in the Act itself which requires the Income-tax Officer to disclose to the assessee the material on which he proposes to act or to refer to it in his order but natural justice demands that he should draw the assessee's attention to it before making the order. Information which the Income-tax Officer has received may not always be accurate and it is only fair when he proposes to act on material which he has obtained from an outside source that he should give the assessee an opportunity of showing, if he can, that the Income-tax Officer has been misinformed, but the Income-tax Officer is obviously not bound to disclose the source of his information.

An order made by an Income-tax Officer under S. 23 (3) is appealable. When considering whether an order is right, the

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appellate authority must, of course, know on what it is based and if the basis of the order is not disclosed in the order itself, it means that the appellate authority will have to refer the matter back to the Income-tax Officer in order to find out what the position is. Moreover, this Court has often to consider an order of an Income-tax Officer and it is convenient to this Court to know from the order itself why it was passed. From every point of view it is desirable that the Income-tax Officer should indicate in his order the material on which he has made his assessment, but I realize that he cannot be compelled to do so.

In the reference made by the Commissioner of Income-tax and also in the course of the arguments, mention has been made of S. 13. The Commissioner of Income-tax suggests that S. 13 can be read in conjunction with S. 23 (3) and that the effect of so doing is to bring sub-S. (3) of S. 23 in line with sub-S. (4). In *Ganga Ram-Balmokand* v. *Commissioner of Income-tax, Punjab*[1], the Lahore High Court appears to have read the section in this way and the Rangoon High Court appears to have done the same in *Chan Low Chwan* v. *Commissioner of Income-tax*[2]. I find myself unable to take the same view. S. 13 reads as follows:

> "Income, profits and gains shall be computed, for the purposes of Ss. 10, 11 and 12 in accordance with the method of accounting regularly employed by the assessee:
>
> Provided that, if no method of accounting has been regularly employed, or if the method employed is such that, in the opinion of the Income-tax Officer, the income, profits and gains cannot properly be deduced therefrom, then the computation shall be made upon such basis and in such manner as the Income-tax Officer may determine"

It seems to me that all the section really says is that, if the method of accounting employed by the assessee is a method which does not properly disclose the income, profits and gains of the assessee, the Income-tax Officer can adopt his own method. But in doing so he must have reference to the accounts before him as S. 13 does not contemplate the rejection of the accounts. S. 13 adds nothing to and takes nothing away from S. 23 (3).

The reference will be answered in the sense I have indicated and the Income-tax authorities will carry out the assessment in the light of the observations made in this judg-

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1. (1937) I.L.R. 19 Lah. 10. 2. (1929) I.L.R. 7 Rang. 281 (F.B.).

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ment. We consider that this is a case in which there should be no order as to costs but we direct, that the deposit made by the assessee be returned to him.

Reference answered in the affirmative.

K.C.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VARADACHARIAR AND MR. JUSTICE ABDUR RAHMAN.

Surathu Sitharatnamma .. *Appellant** (*Defendant*)

v.

Pillarisetti Seshamma and another .. *Respondents* (*Plaintiffs*).

Sitharatnamma v. Seshamma.

Hindu Law—Maintenance—Husband dying leaving a will—Will providing for a particular rate of maintenance—Court, if can interfere with such provision as inadequate—Widow living apart for no justifiable cause—No improper reason for her living apart—If she forfeits her right to future maintenance—Maintenance, if can be enforced against a legatee from her husband.

Where a person dies leaving behind a widow and a daughter and a will under which he has made some provision for the maintenance of the wife and the daughter, the Court's power to fix a reasonable maintenance is not taken away. The provision in the will can only be taken as a suggestion made by the husband as to what would be a reasonable provision for maintenance. Where therefore the Court finds that a provision in the will is inadequate, it is within the power of the Court to substitute a more reasonable provision.

Opinion of Cox, J., in *Promotha Nath Roy* v. *Nagendrabala Chaudhrani*, (1908) 12 C.W.N. 808, approved.

The question whether a wife who, during her husband's lifetime, had lived apart from him without justifiable cause but for no improper purpose, forfeits her right to future maintenance for all time or is merely prevented from claiming separate maintenance during the time that she is living apart and if that claim can be enforced against a legatee from the husband left open.

Surampalli Bangaramma v. *Surampalli Bramhazee*, (1908) 18 M.L.J. 254: I.L.R. 31 Mad. 338, approved.

Bommadevara Naganna Nayudu Bahadur v. *Bommadevara Rajya Lakshmidevi Amma*, (1928) 55 M.L.J. 242 (P.C.), distinguished as a case of arrears of maintenance.

Sankaramurthi v. *Subbamma*, A.I.R. 1938 Mad. 914, distinguished as a claim by a daughter-in-law from a legatee of father-in-law's self-acquired properties.

Appeals against the decree of the Court of the Subordinate Judge (Additional) of Masulipatam dated 9th December, 1935,

* App. Nos. 151 and 249 of 1936. 13th December, 1938.

and made in O.S. No. 48 of 1935 (O.S. No. 33 of 1934 on the file of the District Court of Kistna). Sitha-ratnamma v. Seshamma.

G. Lakshmanna and *P. S. Ramachandra Aiyar* for Respondents in A.S. No. 151 of 1936 and for Appellants in A.S. No. 249 of 1936.

P. V. Rajamannar and *K. Subba Rao* for Appellants in A. S. No. 151 of 1936 and Respondents in A. S. No. 249 of 1936.

The judgment of the Court was delivered by

Varadachariar, J.—These appeals arise out of the same suit which related to the estate of one Pillarisetti Butchi Venkatarao Naidu who died at Masulipatam on 17th November, 1932. The first plaintiff is the junior wife of the deceased and the second plaintiff is her minor daughter. The defendant is the daughter of the deceased by his predeceased senior wife. The main prayer in the plaint was for recovery of possession by the plaintiffs, on the footing that the deceased died intestate. As the defendant was setting up a will alleged to have been executed by the deceased on 10th May, 1932, there were alternative prayers for maintenance, for the marriage expenses of the second plaintiff, etc. The defendant set up Ex. I as the will left by the deceased. The plaintiff denied its genuineness and contended that even if it had been executed by the deceased, it must have been got from him at a time when he was not of a sound disposing state of mind and as a result of undue and overpowering influence exercised by the defendant and those interested in her. The defendant denied these allegations. The will Ex. I contains certain provisions as regards the maintenance to be paid to the plaintiffs and the money to be paid for the marriage expenses of the second plaintiff. The plaintiffs contended that even if the will was true and otherwise valid, these provisions as regards the maintenance, marriage expenses, etc., could not affect their right to a reasonable provision for the same under Hindu law. Varada-chariar, J.

The learned Subordinate Judge held that Ex. I was duly executed by the deceased in a sound disposing state of mind and was not brought about by any undue influence. He accordingly dismissed the suit so far as it claimed possession of the estate. He was however of opinion that the provisions in Ex. I as regards maintenance and marriage expenses to be paid to the plaintiffs were inadequate and unsubstantial and were not binding upon the plaintiffs. He was also of opinion that the

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security for the same provided by the will was of very little value. He accordingly enhanced the amounts payable to the plaintiffs under these heads and made better provision for securing their payment. The plaintiffs have preferred A. S. No. 249 of 1936 against this decree and the defendant has preferred A. S. No. 151 of 1936.

So far as the claim for recovery of possession of the estate on the footing of intestacy is concerned, we see no reason to differ from the conclusion of the learned Subordinate Judge. Ex. I purports to have been executed on the 10th of May, 1932, that is, nearly six months before the death of the deceased. It was deposited with the District Registrar of Vizagapatam on the 16th of June, as the deceased happened to go to Vizagapatam and stay there for nearly a month for medical treatment. D. W. 2 who was admittedly the doctor who was treating the deceased at Masulipatam speaks to the physical and mental capacity of the deceased in May, 1932. A point has been made that this witness has not been asked to attest the will; but the very fact that the deceased preferred to deposit the will rather than register it shows that for some reason, the deceased did not wish the contents of the will to become known to a large circle of people. The evidence of P. W. 3, the doctor who examined the deceased at Vizagapatam does not suggest that the deceased was not capable of executing a will on the 10th of May. He was only asked whether the deceased was capable of engaging his mind in elaborate intellectual work requiring sustained and serious attention and clear memory and he said 'no'.

In view of the strained relations that had long subsisted between the first plaintiff and the deceased, as shown by the evidence in the case, the deceased practically cut off the plaintiffs with a small provision in their favour and gave his property to his first wife's daughter, the defendant. There is nothing very elaborate in the scheme of the will to support any argument that it was too serious a strain on the mental capacity of the deceased to undertake at the time. On the other hand, the post-cards Exs. XVIII series and XXI series written by the deceased to D. W. 4 during the months of May and June, 1932, clearly show that he was equal to the ordinary daily work and to writing letters, etc. Direct evidence in support of the will has been given by the writer D. W. 5 and the attestors D. Ws. 4,

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6 and 8. Nothing has been elicited in their cross-examination to lead us to think that they are not witnesses of truth. The fact that D. Ws. 4, 5 and 6 are connected with the Salt Factory in which the deceased was a sharer is not by any means an argument against the probability of their taking part in a genuine will executed by the deceased. D. W. 5 is admittedly the writer of two other documents Exs. VI and XIX, executed by the deceased sometime before and sometime after the will.

The main attempt of the learned Counsel for the plaintiffs has been to show that D. W. 4 was in a kind of conspiracy with the defendant to bring about this will, because he expected to derive some substantial advantage for himself under the will. The advantage to the witness suggested by the learned Counsel is that the will recognised a joint interest of the deceased in about 100 acres of lands which the deceased and his partner P. W. 5 had obtained on dharkast near the Salt Factory. This suggestion is wholly unfounded. It is clear from Ex. A that the dharkhast grant had in fact been obtained for the benefit of the three partners, though as the original application had been signed only by the deceased and P. W. 5, the dharkhast grant had in the first instance been made in favour of the two applicants only. P. W. 5 who has now been examined on the plaintiffs' side has not stated anything to throw discredit on Ex. A. Once this suggestion of D W. 4 having a personal interest in bringing about the will Ex. I, is put aside, there is no reason whatever to discredit his evidence or to discredit the evidence of the other attestors who are sought to be discredited only on the ground that they were persons interested in D. W. 4. D. W. 8 had nothing to do with the Salt Factory and he is admittedly a resident of Masulipatam. No doubt, it does not clearly appear from his evidence why the deceased should have thought of sending for him to be an attestor; but beyond suggestions in his cross-examination about his son and the son of D. W. 4 being legal practitioners working together and of some marriage connection through a brother of the witness, nothing has been shown to support the contention that D. W. 8 is in any way interested in supporting the defendant. In the view that we have expressed above that D. W. 4 had nothing to gain personally from the will, any remote connection between D. W. 8 and D. W. 4 is no ground for discrediting the evidence of D. W. 8 so far as this case is concerned.

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Some point was made of the fact that the draft from which the deceased is said to have dictated the will is not now forthcoming. In the circumstances of the case, there seems to us very little force in this contention. The deceased himself had deposited the will before the District Registrar and he lived for several months thereafter. It is hardly likely that he would have thought it necessary to preserve the draft. D. W. 3, the husband of the defendant, appears to have been reading in Madras till March, 1932, and he went over to his father-in-law's place only in April. It is therefore nothing strange if he is unable to say when or how the draft was got prepared.

It was next contended that the will could not have been the handiwork of the deceased because there are mis-statements in the will with reference to the interest which the testator had in certain properties which are referred to in paragraph 4 of the will as having been sold away by the testator. As regards the first item, we do not think the argument of mis-statement is well founded. The reference to this item seems to have been inserted after the body of the will had been written and without due regard to the way in which the inserted sentence read on with the pre-existing sentence. There is no doubt a mistake as regards the quantum of the share which the deceased had in what is spoken of as the bungalow site. But the bungalow site had in fact been sold away already about two years before the date of the will and the purchase of a third share therein which is said to have been lost sight of, being nearly ten years before the will, we do not feel justified in making much of this mistake in whatever way it might have arisen.

It was at one stage suggested that even the deposit with the District Registrar could not have been made by the deceased as he was hardly in a position to go to that office even in a car. We do not think the evidence on record warrants that view of the condition of the testator. All that P. W. 3 says is that if he had been asked to advise on the matter, he would have advised the testator not to go. But the other evidence in the case shows that in spite of his illness, the testator did move about occasionally. There is the admitted fact that in the end of May, 1932, he went all the way from Masulipatam to Vizagapatam halting at Anakapalli on the way where his brother was living and that at the end of June, he returned from Vizagapatam to Masulipatam. This could not and did not

seriously endanger his life because he died only five months later. It also appears from Ex. XXI that about the 7th of May, 1932, the testator was in a position to go to the Salt Factory at Pandraka nearly 15 miles from Masulipatam and this is also spoken to in the oral evidence. We see no justification whatever for the attempt to discredit the truth of the story of the deposit of the will by the testator.

Some point has been made of the fact that P. W. 5, the other partner, has not been asked to attest the will and also of the statement of P. W. 3 that he was not informed by the testator that he had executed a will. We do not feel disposed to attach much importance to such negative circumstances in the face of the positive evidence in the case in favour of the will. Ex. II about whose genuineness there can be no doubt expressly refers to the will as early as on 29th October, 1932, that is, nearly 3 weeks before the testator's death and the joint statement Ex. 17 (*b*) which accompanied Ex. II and has been signed by P. W. 5 and D. W. 4 shows that P. W. 5 must even then have become aware of the decision of the deceased that his share in the Salt Factory should go to the defendant. D. W. 4 has taken a more prominent part in the transaction because, as the letters exhibited in the case show, he seems to have been on terms of greater intimacy with the deceased than P. W. 5. No serious attempt has been made to challenge the genuineness of the signatures in the several pages of the will. Though a plea of absence of a sound disposing state of mind and also a plea of undue influence were raised in the plaint, there is nothing in the evidence to support these pleas. The witnesses who speak to the execution of the will were not even cross-examined as to the condition of the deceased at the time, though in the chief examination, every one of them deposed that the testator was then in a sound disposing state of mind. The question of undue influence has been found against by the lower Court and that finding has not been challenged before us. In view of the truth of the recitals in the will as to the unfriendly relations between the deceased and the first plaintiff during a period of about nine years before the death of deceased, it cannot even be said that there is any force in the argument that the terms of the will are unnatural or such as to rouse suspicion.

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It only remains to deal with the alternative claim to maintenance and other payments. The defendant in her appeal has contended that the lower Court has fixed the maintenance too high. A question has also been raised in support of her appeal that, in the circumstances, the Court has no power to interfere with the provision made by the deceased in the will. The plaintiffs on the other hand have, in their appeal, claimed that a more liberal provision should be made for their maintenance and for the expenses of the second plaintiff's marriage. Having given to the contentions of both sides our best consideration, we see no reason to interfere with the rates fixed by the lower Court.

On the question of law raised by Mr. Subba Rao on behalf of the defendant, he drew our attention to the conflicting observations of the two learned Judges of the Calcutta High Court who took part in *Promotha Nath Roy* v. *Nagendrabala Chaudhrani*[1]. It happened in that case that both the learned Judges agreed as to the propriety of the provision that has actually been made in the will. The observations on the general question were therefore *obiter*. It has not been disputed before us that if the husband had bequeathed his property *ignoring* the wife's claim to maintenance, such giving away will not affect the widow's claim to maintenance. If this is the true legal position, it appears to us that there is more to be said in favour of the view taken by Cox, J., in *Promotha Nath Roy* v. *Nagendrabala Chaudhrani*[1], that any provision made by the husband in his will as regards the wife's maintenance cannot be regarded as taking the matter out of the Court's power to fix a reasonable maintenance but can only be taken as a suggestion made by the husband as to what would be a reasonable provision for maintenance. Mr. Subba Rao conceded that if the provision in the will was so unsubstantial as practically to make it illusory, the Court might regard it as a fraudulent exercise of the husband's power, if any, in the matter. Without using such strong language, the learned Subordinate Judge has, in this case, held that the security provided in the will for the payment of maintenance to the plaintiffs is of very little value.

It is no doubt true that for many years before the testator's death, the husband and the wife had been living apart; but there are conflicting versions as to the reason for the same.

1. (1908) 12 C.W.N. 808.

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Fortunately, no improper motives have been suggested for the plaintiffs living apart and it must be said to the credit of both the husband and the wife that in spite of all the strain involved on their good-will by such living apart, the husband never thought that the wife was no longer entitled to claim maintenance or by her conduct had forfeited it. Even during the time that he was ill, he took particular care to see money sent to her every month for her maintenance and a provision has been made in the will on the same lines. While giving credit for this to the husband, we cannot help feeling that when it came to his making these provisions in the will, the estrangement caused by such living apart has weighted his feelings far too much against the plaintiffs. The mere fact that during his life time he has been giving her Rs. 20 per mensem will not of itself establish that that was an adequate provision for all time. The first plaintiff was day by day growing older and her father on whom she might at one time have relied was growing older too. On the other hand, the second plaintiff, as she was growing in age, would require greater expenditure to bring her up in a decent way befitting their position in society. There is again the fact that during his illness which was chronic and protracted, the husband had to spend large amounts on his own treatment and that might well have made it difficult for him to make a more liberal provision for the plaintiffs. But that necessity ceased with his death. In these circumstances, we have come to the conclusion that the provision made by the deceased in his will in favour of the plaintiffs is inadequate and it is within the power of the Court to substitute a more reasonable provision.

The learned Counsel for the defendant next contended that by reason of the first plaintiff living apart from her husband for so many years, she must be deemed to have forfeited her right to maintenance and that a right to the same in these circumstances cannot be enforced against the legatee from the husband. In support of this proposition, he relied on the decisions in *Bommadevara Naganna Nayudu Bahadur* v. *Bommadevara Rajya Lakshmidevi Ammal* and *Sankaramurthi* v. *Subbamma*[2]. The point decided in *Sankaramurthi* v. *Subbamma*[2] does not now arise for decision. The learned Judges recognised the existence of a conflict of judicial opinion on the point then before them, namely, the right of a daughter-in-law to claim maintenance

1. (1928) 55 M.L.J. 242 (P.C.). 2. A.I.R 1938 Mad. 914.

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from a legatee who has taken the father-in-law's self-acquired property under a bequest. The decision proceeds on the footing that the daughter-in-law had no legal right to claim maintenance from the father-in-law during his lifetime. That is not the position here; because, subject to the defendant's argument as to forfeiture by reason of separate living, the plaintiffs undoubtedly had a legal right to claim maintenance from the defendant's father. The decision of the Privy Council in *Bommadevara Naganna Nayudu Bahadur* v. *Bommadevara Rajya Lakshmidevi Ammal*[1] does not support the argument that a wife for ever forfeits her claim to maintenance by living away from the husband. Their Lordships were only dealing with a claim for arrears of maintenance claimed in respect of a period during which the wife had been living away from the husband without justifiable cause. No question arose in that case with reference to a claim for future maintenance. We have examined the record of that case and the judgment of the Subordinate Judge explains why no claim for future maintenance had to be considered in that case. The wife did not there sue for future maintenance and as a matter of fact, her husband died two months after the institution of the suit. By the affirmation of the trial Court's judgment, their Lordships of the Judicial Committee could not be taken to have negatived the wife's right to future maintenance, because the learned Subordinate Judge stated in that case at the conclusion of his judgment that since the date of her husband's death, the plaintiff would certainly have been entitled to maintenance. It seems to us therefore safe to proceed on the footing that in *Bommadevara Naganna Nayudu Bahadur* v. *Bommadevara Rajya Lakshmidevi Ammal*[1], their Lordships did not pronounce an opinion on the question whether a wife who, during her husband's lifetime, had lived apart from him without justifiable cause but for no improper purpose forfeits her right to maintenance for all time or is merely prevented from claiming separate maintenance during the time that she is living apart. In *Surampalli Bangaramma* v. *Surampalli Bramhasee*[2], one of the learned Judges was clearly of opinion that it would merely be a case of suspension of the right and not a forfeiture. Even on this question, it is unnecessary in the present case to express

1. (1928) 55 M.L.J. 242 (P.C.).
2. (1908) 18 M.L.J. 254 : I.L.R. 31 Mad. 338.

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a definite opinion, because the husband's conduct itself clearly showed that he never regarded the wife as having forfeited her claim to maintenance. As we have observed already, he was, throughout his lifetime, remitting monies to the first plaintiff for the maintenance of herself and the second plaintiff and made what he considered a suitable provision for the same in the will. The only question for decision therefore is as to the reasonableness of the provision that has been made by him.

It was next contended by the learned Counsel for the defendant that the lower Court had over-estimated the income from the Salt Factory and that the provision made by the lower Court in favour of the plaintiffs was much too onerous to the defendant. On the other hand, it has been contended by learned Counsel for the plaintiffs that the lower Court's estimate of the income was unduly low and that the provision made by the lower Court is inadequate. We do not think there is any justification for the contention that the lower Court's estimate of the income is too high. It is true that the testator contemplated the possibility of the income some times going below Rs. 1,000; but the suit was actually tried three years after the testator's death and the defendant was in the best position to produce satisfactory materials to establish what the income was. Though we have held that the plaintiffs were not justified in suggesting any kind of conspiracy between D.W. 4 and the defendant during the testator's lifetime to bring into existence the will Ex. I, there can be little doubt that during the trial D.W. 4 has been doing his best to support the defendant's case. The reason given for the non-production of the factory accounts for the years 1932-33 and 1933-34 is wholly unconvincing. The accounts for 1934-35 have been produced. Mr. Lakshmanna has contended that even these accounts are not reliable because, according to him, the prices shown for the sale of salt are not true prices. The learned Subordinate Judge was also of the opinion that D.W. 4 and the defendant were estimating the income much too low. We think that the figure fixed by him is perhaps the safest estimate in the circumstances. On that basis, we see no reason to differ from the rates fixed by him for the maintenance of the plaintiffs and for the expenses of the second plaintiff's marriage.

The result is that both the appeals must be dismissed with costs and the lower Court's decree confirmed except in respect

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of two matters. As the plaintiffs instituted the suit *in forma pauperis*, the lower Court has made provision in its decree for payment of the court-fee payable to Government and the amount thus directed to be paid is Rs. 2,539-13-0. Mr. Lakshmanna has contended—and we think rightly—that the lower Court has arrived at this figure on a wrong view of the law. The plaint contained alternative prayers either for possession or for maintenance. When the matter was before the District Court, the District Court made an order on 15th January, 1935, directing that court-fee should be calculated under S. 17 of the Court-Fees Act on three separate heads, namely, the claim for possession, the claim for maintenance, etc. and the claim in respect of the *C* schedule. Totalling up the three heads the learned District Judge made up the sum of Rs. 2,539-13-0 as follows:—Rs. 1,582-7-0 for recovery of possession, Rs. 837-7-0 for the maintenance claim and Rs. 119-15-0 for the *C* schedule claim. The inclusion of Rs. 837-7-0 as a separate item seems to us unwarranted. The payment of court-fee for the higher claim for possession was, in the circumstances, sufficient to cover the alternative claim as well. The sum of Rs. 2,539-13-0 mentioned as court-fee in the lower Court's decree will accordingly be reduced to Rs. 1,702-6-0.

It has also been brought to our notice that the decree of the lower Court does not incorporate the provision in the judgment for the expenses of the second plaintiff's marriage. This provision will be included in the decree as it is covered by the provision for charge made in the concluding portion of the lower Court's decree. The decree will however state that the amount awarded for the marriage expenses will be claimable only three months before the date fixed for the marriage.

S.V.V. —— *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN AND MR. JUSTICE STODART.

Ramabadra Reddiar .. *Appellant** (*Petitioner*)

v.

Lakshmambal Ammal and another.. *Respondents* (*Respondents*).

Ramabadra Reddiar v. Lakshmambal Ammal.

Civil Procedure Code (V of 1908)—Decree—Award of interest until date of realisation—Sale in execution—Leave to bid and set off—Date of realisation, meaning of—Date of sale.

* A. A. O. No 66 of 1936. 14th December, 1938

Where a decree awarded interest "*until date of realisation*," and the decree-holder obtained leave to bid and set off in execution of that decree, the date of realisation is the date of sale and not the date on which the money is realised by the decree-holder.

Sait Punnamchand Chatraban Firm v. *Vijjapu Satyanandam*, (1933) 65 M.L.J. 569: I.L.R. 57 Mad. 38, applied.

Appeal against the order of the District Court of South Arcot dated 10th July, 1935, and made in E.P. R. No. 20 of 1935 (E.P. No. 2 of 1935) in O.S. No. 35 of 1928.

S. Panchapagesa Sastri and *K.R. Krishnaswami Aiyar* for Appellant.

A. Balasubramania Aiyar for Respondents.

The Court delivered the following

JUDGMENT.—The decree entitled the decree-holder to interest "until the date of realization". The learned District Judge has held that in a case like this, where the decree-holder has been given permission to bid and set off the date of realization is the date of sale. There is good authority for this in the case of *Sait Punnamchand Chatraban Firm* v. *Vijjapu Satyanandam*[1] and we think the learned District Judge was right in relying on that case. That was a case under S. 73 of the Code of Civil Procedure but the language used by the learned Judges and the interpretation of O. 21, r. 72 of the Code of Civil Procedure which they have adopted, are of general application. Learned Counsel for the appellant contends that the words "date of realization" in the decree mean the date on which the money is realized *by the decree-holder*, and he relies on *Khalil-ur-Rahman* v. *Gokul Prasad*[2] and *A.S.N. Chettiar Firm* v. *Imperial Bank of India, Bassein*[3], in which that view is taken. With respect we prefer to follow the decision of this Court reported in *Sait Punnamchand Chatraban Firm* v. *Vijjapu Satyanandam*[1]. The decree does not give interest until date of realization by the decree-holder, but simply till date of realization, and that, we think in a case like this is the date of sale. This appeal is accordingly dismissed with costs.

S.V.V. —— *Appeal dismissed.*

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1. (1933) 65 M.L.J. 569: I.L.R. 57 Mad. 38.
2. (1919) I.L.R. 41 All. 526.
3. A.I.R. 1937 Rang. 193.

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE WADSWORTH AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

K. V. Krishna Aiyar .. *Appellant* (Plaintiff)*

v.

K. G. Subramania Aiyar .. *Respondent (2nd Defendant)*.

F.B.
Krishna Aiyar *v.* Subramania Aiyar.

Civil Procedure Code (V of 1908), S. 47—Money decree—Attachment and sale of property in execution—Purchase by decree-holder—Property leased prior to attachment—Possession with lessee—No possession actual or symbolical taken by decree-holder—Surrender to judgment-debtor by lessee after execution sale—Suit by decree-holder for possession—If not maintainable—S. 47, Civil Procedure Code, if bars the suit.

In execution of a small cause decree against *S* the property in question was purchased by the decree-holder *K* in 1917. At the time of the sale the property was in the possession of one *L* (*S's* sister) as a monthly tenant under *S*, the lease being one of an earlier date than the attachment by *K*. The said *L* later *bona fide* surrendered the property in 1919 to *S*, who again leased it to another. The decree-holder later sold the property to others. Neither the decree-holder nor his alienees obtained either actual or symbolical possession of the property. An alienee of the property through *K* filed a suit against *S* and the last tenant from *S* for possession and the defence was that the proper remedy was by an application under S. 47, Civil Procedure Code and not by suit.

Held, that S. 47 did not bar the suit. Though a decree-holder who purchases property in execution cannot institute a suit to recover possession from the judgment-debtor or some one who stands in the shoes of the judgment-debtor and his remedy is confined by cases to an application under S. 47, yet in the circumstances here *S* cannot be regarded as the judgment-debtor. *S* got possession from his sister *L* either as the assignee of the tenancy which commenced before the attachment by *K*, or as trespasser if *L* should have surrendered legally to *K* and not to *L*. In either case S. 47 cannot be relied on, as *S* does not take the property from *L* in his capacity as judgment-debtor.

At the time of the auction sale *S* was seised of the property but was not in possession of it and the auction sale took away from him his seisin and gave it to the auction-purchaser. The moment the sale took place his rights in the property ceased and when *L* put him in possession in 1919 he went into possession without any rights unless in the circumstances he could be deemed to be the assignee of the tenancy So far as the property was concerned the execution was complete and he was no longer the judgment-debtor.

Appeal under cl. 15 of the Letters Patent against the judgment and decree of Venkataramana Rao, J., dated 31st October, 1935 and passed in S. A. No. 1542 of 1931 preferred

* L.P.App. No. 108 of 1935. 13th December, 1938.

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to the High Court against the decree of the Court of the Subordinate Judge of South Malabar at Palghat in A. S. No. 129 of 1929 (A.S. No. 336 of 1929, District Court) preferred against the decree of the Court of the District Munsif of Palghat in O. S. No. 319 of 1927.

P. S. Narayanaswami Aiyar and *P. S. Ramachandra Aiyar* for Appellant.

K. V. Ramaseshan for Respondent.

The Court delivered the following

Leach, C.J.

JUDGMENTS: *The Chief Justice.*—This appeal adds another case to the long list of cases which have reference to the effect of S. 47 of the Code of Civil Procedure. The facts of the present case are of an unusual nature and there is no reported decision which directly covers it. In execution of a small cause decree passed by the Court of the District Munsif of Palghat the property which is the subject-matter of this appeal was purchased on the 17th September, 1917, by one Krishnier to whom was issued the usual sale certificate. On the 7th January, 1918, Krishnier conveyed the property to two persons, Krishna Pattar and Subbalakshmammal, who by a deed dated the 3rd February, 1927, sold it to K. V. Krishna Aiyar, the present appellant. At the time of the sale the property was in the possession of Lakshmi Ammal, a sister of Sankaranarayana Aiyar, the judgment-debtor. She held the property as a monthly tenant of her brother. n 1919 she surrendered the possession of the property to Sankaranarayana Aiyar, who thereupon granted a monthly tenancy of it to a person named Kuppiah Pattar. In 1923 Kuppiah Pattar assigned his rights to one K.G. Subramania Aiyar who remained in possession of the property as a monthly tenant of Sankaranarayana Aiyar until 1927 when he purchased the property from Sankaranarayana Aiyar. Neither Krishnier nor the appellant ever obtained actual or symbolical possession of the property. The suit out of which this appeal arises was filed by the appellant against Sankaranarayana Aiyar and K. G. Subramania Aiyar for possession. In his plaint the appellant treated the surrender of the property by Lakshmi Ammal to Sankaranarayana Aiyar as an assignment to him of her tenancy and Sankaranarayana Aiyar and K. G. Subramania Aiyar as successive holders of the tenancy. One line of defence was that the appellant had acquired no interest in the property. It was said that the transfer by Krishnier to

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Krishna Pattar and Subbalakshmammal was a *benami* transaction and that the real title remained with Krishnier. The main contention, however, was that S. 47 of the Code of Civil Procedure barred the suit. The District Munsif found against the plaintiff on both issues and dismissed the suit. On appeal to the Subordinate Judge of South Malabar the decree of the trial Court was reversed, the Subordinate Judge holding that the transaction was not *benami* and that S. 47 did not apply. A second appeal to this Court followed and was heard by Venkataramana Rao, J., who agreed with the District Munsif on the question of the application of S. 47, but granted him leave to file an appeal under cl. 15 of the Letters Patent. The decision of the Subordinate Judge was final on the question whether the transaction between Krishnier and Krishna Pattar and Subbalakshmammal was of a *benami* nature.

The question which falls for decision is in what capacity did Sankaranarayana Aiyar obtain possession of the property from his sister? If he obtained possession of the property in the same capacity as he held at the time of the sale in execution the appeal fails; but if he obtained it in another capacity the appeal succeeds. As Venkataramana Rao, J., has pointed out in his judgment, so far as this Court is concerned, it is well settled that proceedings by a decree-holder who has become the auction-purchaser for delivery of possession must be deemed to relate to the execution or discharge or satisfaction of the decree within the meaning of S. 47 of the Code of Civil Procedure. It is considered that the section bars a suit by a decree-holder for possession of the property purchased by him in execution of his own decree not only against the judgment-debtor or any one claiming under him but the bar is equally applicable to a purchaser from the decree-holder. The learned Judge referred in this connection to the decisions of the Court in *Sandhu Taraganar* v. *Hussain Sahib*[1] and *Sornam Pillai* v. *Tiruvazhiperumal Pillai*[2]. In *Veyindramuthu Pillai* v. *Maya Nadan*[3], it was held by a Full Bench that a purchaser at a Court auction who is a stranger to the suit comes within the purview of S. 47 as the representative of the judgment-debtor. There are numerous decisions which support the judgments in the cases

1. (1904) 14 M.L.J. 474: I.L.R. 28 Mad. 87.
2. (1926) 51 M.L.J. 126.
3. (1919) 38 M.L.J. 32: I.L.R. 43 Mad. 107 (F.B.).

just cited. The Calcutta High Court shares the view of this Court: *Kailash Chandra Tarapdar* v. *Gopal Chandra Poddar*[1]. Other High Courts have, however, interpreted S. 47 in a different sense. The effect given to S. 47 by this Court has not been accepted without criticism by all the learned Judges who have had to consider the question. In *Kattayat Pathumayi* v. *Raman Menon*[2], Benson and Bashyam Aiyangar, JJ., doubted whether proceedings taken by a decree-holder who had purchased property to obtain possession did relate to the execution, discharge or satisfaction of the decree, but in view of the earlier decisions they felt constrained to follow them. In *Sandhu Taraganar* v. *Hussain Sahib*[3], Arnold White, C.J., observed that if the matter were *res integra*, he would be disposed to hold that the right to sue for possession was not a question relating to the execution, discharge or satisfaction of the decree, where the plaintiff represented a decree-holder who had purchased land in execution of the decree. It has, however, been the practice of this Court for over 50 years to treat S. 47 as having the application which I have indicated and in my opinion it is now far too late in the day to re-open the question. This appeal must, therefore, be decided on the basis that a decree-holder who purchases property in execution cannot institute a suit to recover possession from the judgment-debtor or some one who stands in the shoes of the judgment-debtor and his remedy is confined to an application, where the period of limitation is only three years.

As I have already pointed but, the appellant's case is based on the assumption that Sankaranarayana Aiyar got possession of the property in 1919 as the assignee of the tenancy. It is common ground that a suit for possession will lie if this was the position, as a tenant cannot be regarded as a representative within the meaning of S. 47 where as in this case, the tenancy had commenced before the attachment. In the plaint it was alleged that Lakshmi Ammal fraudulently colluded with Sankaranarayana Aiyar in surrendering the property to him, but no attempt was made to prove this and for the purposes of this appeal it must be taken that her action was *bona fide*. The appellant contends that a tenant can only surrender his tenancy

1. (1926) I.L.R. 53 Cal. 781 (F.B.).
2. (1902) 13 M.L.J. 237: I.L.R. 26 Mad. 740.
3. (1904) 14 M.L.J. 474: I.L.R, 28 Mad. 87.

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to the landlord or if the landlord has parted with his rights in the property to the person who has acquired the landlord's rights and as by reason of the provisions of S. 65 of the Code of Civil Procedure the property in suit vested in Krishnier from the time he bought it at the Court auction, Lakshmi Ammal could not in law surrender the tenancy to her brother. At the time she purported to do so he had no interest in the property. It is said that at the most her action put Sankaranarayana Aiyar in the position of an assignee of the tenancy. There is substance in the argument, but it is not necessary for the purpose of deciding this appeal to pause to inquire whether there is any flaw, because if Sankaranarayana Aiyar cannot in law be deemed to have entered into possession of the property in 1919 as the assignee of the tenancy entered into possession without right and was, therefore, in the eyes of the law a trespasser. A trespasser clearly cannot rely on S. 47 to support his possession.

The fact that Krishnier did not apply for and obtain symbolical possession of the property under the provisions of O. 21, r. 96 of the Code of Civil Procedure could not affect his right to the property. The property vested in him absolutely, with or without symbolical possession, as soon as he became the auction purchaser. R. 96 is there to assist an auction purchaser to secure recognition of rights already acquired. Venkataramana Rao, J., considered that it was obligatory on the part of the appellant to obtain symbolical possession, and that Lakshmi Ammal was bound in law to surrender the property to the person who had granted her tenancy, but the learned Judge overlooked the provisions of S. 65. The fact that Lakshmi Ammal was unaware of the Court auction would excuse her from liability in surrendering possession of the property to her brother, but the surrender could not put him in any better position. It must be remembered that there is a great difference between possession and seisin. The owner of property who has created a tenancy is seised of the property but the possession is with his tenant. In *Doe* v. *Finch*[1], Denman, C.J., observed that where it is said that the possession of a tenant for years is the possession of the party entitled to the freehold, that imports that such person is seised of the estate of freehold. At the time of the auction sale Sankaranarayana Aiyar was seised of the property but was not in possession of it and the auction

1. (1832) 4 B. & Ad. 283: 110 E.R. 462,

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sale took away from him his seisin and gave it to the auction purchaser. The moment the sale took place his rights in the property ceased, and when his sister put him in possession in 1919 he went into possession without any rights unless in the circumstances he could be deemed to be assignee of the tenancy. So far as the property was concerned the execution was complete and he was no longer the judgment-debtor.

For the reasons indicated I am firmly of the opinion that the case does not fall within the purview of S. 47 of the Code of Civil Procedure and I would allow the appeal with costs throughout.

Wadsworth, J. Krishnaswami Aiyangar, J.

Wadsworth, J.—I agree.

K. S. Krishnaswami Aiyangar, J.—I also agree.

S. V. V. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO.

Joura Madhava Sahu (dead) and another .. *Appellants** (*Defendant and his L.R.*)

v.

Telli Satrughana Sahu .. *Respondent* (*Plaintiff*).

Madhava Sahu v. Satrughana Sahu.

Execution—Cross-decrees passed by consent—Prior agreement not to execute decrees—One party taking out execution in breach of agreement—Claim for damages—S. 47, Civil Procedure Code, whether operates as bar.

The plaintiff instituted a suit in the District Munsif's Court of Berhampore against the defendant and his brother for arrears of rent due to him. The defendant instituted a suit in the same Court for the recovery of an amount due on a promissory note executed by the plaintiff in favour of the defendant. As the result of an arrangement come to between the parties consent decrees were passed in both the suits for equal amounts. It was also agreed that the amounts should be set off against each other and that no execution proceedings should be taken. In accordance with the arrangement the plaintiff did not execute the decree obtained by him against the defendant; but the defendant filed an execution application and realised the full amount due thereunder from the plaintiff. The plaintiff thereupon instituted a suit against the defendant for damages.

Held, that whether the obligation was viewed as an implied promise or one arising under the provisions of O. 21, r. 2, Civil Procedure Code, there was a breach of that obligation on which a suit for damages would lie and that S. 47, Civil Procedure Code, would be no bar to the plaintiff's claim. The agreement relied on was not merely one not to execute the decree but that each should set off the amount of the decree obtained by each againt the other. Therefore the moment the decrees were obtained by each

* S. A. No. 711 of 1934. 4th November, 1938.

Madhava Sahu v Satrughana Sahu.

they operated as payment of the decrees obtained by each against the other and there was an obligation to enter up satisfaction.

Viraraghava v *Subbakka*, (1882) I.L.R. 5 Mad. 397 (F.B.), relied on.

Butchiah Chetti v. *Tayar Rao Naidu*, (1930) 60 M.L.J. 721: I.L.R. 54 Mad. 184; *Papamma* v. *Venkayya*, (1935) 69 M.L.J. 451: I.L.R. 58 Mad. 994 (F. B.) and *Narayanan Nambudri* v. *Damodaran Nambudri*, A.I.R. 1931 Mad. 26, considered.

Appeal against the decree of the District Court of Ganjam in A.S. No. 9 of 1934 preferred against the decree of the Court of the District Munsif (Additional) of Berhampur in O. S. No. 304 of 1932.

B. Jagannadha Das for Appellants.

G. Chandrasekhara Sastri for Respondent.

The Court delivered the following

JUDGMENT.—This second appeal arises out of a suit for recovery of damages instituted by the plaintiff against the defendant in the Court of the District Munsif of Berhampore. The plaintiff obtained a decree and it was confirmed in appeal by the learned District Judge of Ganjam. It is against that decision that this second appeal has been preferred by the defendant.

The only point argued on his behalf by Mr. Jagannadha Das is that the suit is barred by S. 47, Civil Procedure Code. To appreciate this contention a few facts may be necessary. The plaintiff instituted a suit (O.S. No. 518 of 1928) in the District Munsif's Court of Berhampore against the defendant and his brother for arrears of rent due to him. The defendant instituted a suit (O. S. No. 365 of 1928) in the same Court for the recovery of an amount due on a promissory note executed by the plaintiff in favour of the defendant. In both the suits consent decrees were passed for equal amounts on the 23rd April, 1929. They were the result of an arrangement come to between the parties. This arrangement is spoken to by P.W. 2 the pleader who represented the defendant in O.S. No. 365 of 1928. He states thus in his deposition:

"I am defendant's pleader in O. S. No. 365 of 1928 who was plaintiff in that suit. In O. S. No. 518 of 1928 I defended the first defendant in a suit filed by the present plaintiff against him. I and the plaintiff's pleader compromised the two suits, the terms being that the amounts due on each suit was equalised and agreed that decree for equal amounts should be given to each. It was also agreed that the amounts should be set off against each other and that no execution proceedings should be taken. This elaborate

arrangement, instead of dismissal of the suits, was made because the clients did not like the idea of the suits being dismissed."

The arrangement thus deposed has been found to be true by both the learned District Munsif and the learned District Judge. In accordance with the arrangement, the plaintiff did not execute the decree obtained by him against the defendant but the defendant on 22nd April 1932, just a day before the period for executing the decree would expire, filed an application for execution of his decree in O.S. No. 365 of 1928 and realised the full amount due thereunder from the plaintiff. The plaintiff thereupon filed this suit for damages. The learned District Munsif was of the opinion that the suit was not barred by S. 47, Civil Procedure Code, because the plaintiff could not set up this agreement in answer to the claim for execution by reason of ninety days having elapsed from the date of the agreement and O. 21, r. 2 precludes the recognition of any adjustment after the expiry of the period of limitation for certifying the payment or adjustment. The learned District Judge was of the view that the agreement arrived at was one attacking the decree and therefore could not be pleaded in bar of the plaintiff's application for execution. He relied on the decision in *Butchiah Chetti* v. *Tayar Rao Naidu*[1]. Mr. Jagannadha Das contends that the view taken in *Butchiah Chetti* v. *Tayar Rao Naidu*[1], could not be held to be correct in view of the Full Bench decision in *Papamma* v. *Venkayya*[2], which held that a pre-decree agreement not to execute the decree could be pleaded in bar of execution. In this view Mr. Jagannadha Das further contends that as there was no question of any bar of limitation and therefore no impediment to setting up this plea in answer to the plaintiff's claim for execution, the defendant is precluded by S. 47, Civil Procedure Code, from instituting this suit as no cause of action can be founded thereon. Mr. Jagannadha Das also relied on the observations of Curgenven, J., in *Narayanan Nambudri* v. *Damodaran Nambudri*[3], where the learned Judge has held at page 27 that an agreement originating before a decree not to take out execution under it can be dealt with by the executing Court under S. 47, Civil Procedure Code and accordingly no suit would lie. Mr. Chandrasekara Sastri for

1. (1930) 60 M.L.J. 721: I.L.R. 54 Mad. 184.
2. (1935) 69 M.L.J. 451: I.L.R. 58 Mad. 994 (F.B.).
3. A.I.R. 1931 Mad. 26.

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the respondent canvasses the soundness of this view, but I think it unnecessary to deal with this question. In my view the agreement relied on was not merely one not to execute the decree. The agreement was that each should set off the amount of the decree obtained by each against the other; in effect, each should take the amount of the decree obtained against him as payment towards the decree obtained by him and satisfaction entered thereon. Therefore the moment the decrees were obtained by each, they operated as payment of the decrees obtained by each against the other and there was an obligation to enter up satisfaction. Therefore, on the passing of the decrees in April 1929 there must be deemed to have been a payment made by the plaintiff to the defendant in respect of the said decree with the consequent duty to certify the said payment and enter up satisfaction of the decree. Though the agreement was before the decree, yet the payment and satisfaction were after it. Whether the obligation is viewed as an implied promise or one arising under the provisions of O. 21, r. 2, there was a breach of that obligation on which a suit for damages would lie. It seems to me that this case is covered by the principle of the Full Bench decision in *Viraraghava* v. *Subbakka*[1] and S. 47, Civil Procedure Code, would be no bar to the plaintiff's claim.

In the result, the second appeal fails and is dismissed with costs.

Leave to appeal is refused.

B. V. V. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Hussain Batcha Sahib .. *Appellant** (*Plaintiff*)

v.

The Secretary of State for India in Council represented by the Collector of North Arcot and another .. *Respondents* (*Defendants*).

Hussain Batcha Sahib v. Secretary of State for India in Council.

Limitation Act (IX of 1908), Art. 131—Suit for declaration that a decision as to the rival claims of plaintiff and second defendant to an office, is binding upon the Government—Nature of claim—Suit whether barred by limitation.

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1. (1882) I.L.R. 5 Mad. 397 (F.B.).

* S. A. No. 275 of 1935. 2nd February, 1939

Hussain Batcha Sahib *v.* Secretary of State for India in Council.

If there is no prayer for the recovery of specified sums from the Government and all that the plaintiff asks is to make binding upon the Government a decision as to the rival claims of himself and another to an office of mutavalli of a Muhammadan mosque to which certain emoluments payable periodically by the Government are attached, the distinction made by Varadachariar, J., in *Krishniah* v. *Lodd Govinda Doss*, A.I.R. 1938 Mad. 47, would class the case in the category with the decision in *Gulam Ghouse Khan Sahib* v. *Jannia*, (1920) 39 M.L.J. 492. It is really the establishment of the title of the plaintiff to the office to which remuneration is attached and not the establishment of the liability of the Government to make the recurring payment, which is the essential claim in the suit. Art. 131 of the Limitation Act will therefore have no application to a claim by the plaintiff against a rival claimant for a declaration of a right to Yeomiah allowance.

Appeal against the decree of the District Court of North Arcot at Vellore in A. S. No. 270 of 1933 preferred against the decree of the Court of the District Munsif of Ranipet in O. S. No. 608 of 1931.

B. Pocker for Appellant.

The Government Pleader (*B. Sitarama Rao*) and *V. T. Rangaswami Aiyangar* for Respondents.

The Court delivered the following

JUDGMENT.—This appeal raises a question of limitation under Art. 131 of the Limitation Act. The plaintiff filed a suit for a declaration that he is the duly appointed Mutavalli, Yeomiadhar and Katheeb of a mosque and that as he has been discharging the duties, he or his successors alone are solely entitled to receive the yeomiah allowance of Rs. 88-8-0 per annum from the first defendant who is the Secretary of State, for an order directing the first defendant to register the plaintiff as the Yeomiadhar entitled to receive the yeomiah allowance and pay the plaintiff such allowance and for an order restraining the first defendant by an injunction from paying the allowance to anyone else other than the plaintiff or his successors. The office by virtue of which the plaintiff claims the yeomiah allowance was held by the plaintiff's maternal uncle who died in 1918. In 1919 the second defendant, widow of the last holder was registered in the Revenue Department's records. In 1921 the plaintiff brought a suit against the registered holder, the second defendant here, claiming a declaration that he was the duly appointed mutavalli, katheeb, etc., of the mosque and entitled to possession of the properties of the mosque. It does not appear in the former suit that any relief was specifically asked for with reference to the yeomiah allowance, though the fact that such allowance was payable is referred to in the judg-

Hussain Batcha Sahib *v.* Secretary of State for India in Council.

ment. That suit resulted in a decree in favour of the plaintiff whose appointment by the Mohammedan Religious Endowments Committee was held to prevail over the registration of the second defendant by the Revenue Department. On the strength of this decision the plaintiff applied to the Revenue Department for his recognition and he was told on 12th July, 1923, that this decree did not bind the Government and did not give the plaintiff a right to receive the allowance in question. The suit was filed on 14th December, 1931, and it is claimed to be within time as being a suit to establish a periodically recurring right and as having been brought within six years of the date on which the Board of Revenue finally rejected his application for registration. The Courts below have held that the suit is barred by limitation on the authority of the decision of a Bench of this Court in *Gulam Ghouse Khan Sahib* v. *Jannia*[1], which held that Art. 131 did not apply to a claim by a person alleged to be a mutavalli of a mosque against a rival claimant for a declaration of a right to a yeomiah allowance. The learned Judges pointed out that it was not really a suit to establish a periodically recurring right but a suit to establish a perpetual right to which periodical payments were attached. Now this decision has been considered by subsequent Benches in the light of a Privy Council decision reported at *Secretary of State* v. *Parashram Madhavrao*[2], in which it was held that a suit by a jagirdar against Government to establish a hereditary right to an annual payment of a percentage of actual revenue rather than of a fixed cash sum was one to which Art. 131 applied, the right to sue accruing with the refusal of the right. In *Krishniah* v. *Lodd Govinda Doss*[3], Varadachariar and Pandrang Row, JJ., considered *Gulam Ghouse Khan Sahib* v. *Jannia*[1], in the light of the Privy Council ruling referred to. They had to deal with a claim to recover *mera* out of the village income collected by a zamindar. They distinguish the decision in *Gulam Ghouse Khan Sahib* v. *Jannia*[1], on the ground that that was a suit between rival claimants to a right and not a suit to establish a right as against the person bound to pay, the question in the earlier decision being not so much one of limitation for recovery of money as of limitation for establishing a right

1. (1920) 39 M.L.J. 492.
2. (1934) 66 M.L.J. 614: L.R. 61 I.A. 190: I.L.R. 58 Bom. 306 (P.C.).
3. A.I.R. 1938 Mad, 47.

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to an office. It is contended, applying this distinction to the present case, that we are now dealing with a suit against the Government to establish a right to receive emoluments; but I do not think that this is the correct way of looking at the case. It is true that in *Gulam Ghouse Khan Sahib* v. *Jannia*[1], the Government was not a party whereas the Government is impleaded in the present case. But in the present case there is no prayer for the recovery of specified sums from the Government and all that the plaintiff asks is to make binding upon the Government a decision as to the rival claims of himself and the second defendant to an office to which certain emoluments payable periodically by the Government are attached. To my mind the distinction made by Varadachariar, J., in *Krishniah* v. *Lodd Govinda Doss*[2], classes the present case in the same category with the decision in *Gulam Ghouse Khan Sahib* v. *Jannia*[1]. The essential question in the present case is not the liability of the Government to make a payment under a periodically recurring right, but the question whether *A* or *B* is the person entitled to receive a payment admittedly due to the office holder by virtue of his holding a particular office. It is really the establishment of the title of the plaintiff to the office to which a remuneration is attached and not the establishment of the liability of the Government to make the recurring payment, which is the essential claim in the suit.

It is argued that even if Art. 120 applies, the plaintiff has six years from the final refusal to recognise his rights. That argument is not tenable, for Art. 120 gives a period of six years from the date when the right to sue accrues and certainly in the present case the right of the plaintiff to sue accrued when the Government recognised the second defendant as the holder of the office entitled to receive the emoluments and not when the plaintiff's final appeal to the Board of Revenue was rejected. In the result therefore I agree with the decision of the Courts below that the suit is barred by limitation and dismiss this appeal with costs—two sets.

Leave to appeal is granted.

K.C. —— *Appeal dismissed.*

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1. (1920) 39 M L.J. 492. 2. A.I.R. 1938 Mad. 47.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW.

D. S. Raju Gupta .. *Appellant** (*Accused*).

Raju Gupta, *In re.*

Criminal Procedure Code (V of 1898 as amended), Ss. 476 and 476-B—Orders under—Appeal and revision to High Court—Practice—Filing on civil or criminal side—Madras Criminal Rules of Practice, r. 37 – Validity.

The jurisdiction that is exercised by a Court in filing a complaint under S. 476, Criminal Procedure Code, is a jurisdiction of a criminal nature. Consequently appeals from orders under S. 476 and revisions preferred from appellate orders made under S. 476-B, Criminal Procedure Code, are proceedings of a criminal nature and should therefore be filed on the criminal and not on the civil side of the High Court And r. 37 of the Madras Criminal Rules of Practice is not in consonance with law in so far as it prescribes that the appeal should be filed on the civil side of the High Court and not on the criminal side.

Janardhana Rao v. *Lakshmi Narasamma*, (1933) 65 M L J. 873: I.L.R. 57 Mad 177 (F.B); *Dhanpat Rai* v. *Balak Ram*, (1931) I.L.R 13 Lah. 342 (F.B.) and *Emperor* v. *Bhatu Sadu*, I L R. (1938) Bom. 331 (F.B.), referred to.

Appeal against the order of the Court of Session of the Vizagapatam Division dated 10th November, 1938, and made in O. P. No. 99 of 1938.

Kasturi Seshagiri Rao for Appellant.

The Court made the following

ORDER.—The District Judge of Vizagapatam made an order under Ss. 476 and 195 of the Criminal Procedure Code directing that a complaint should be preferred charging one D.S. Raju Gupta, Managing Director, Bharathamatha Commonwealth Insurance Bank, Ltd., Vizagapatam, with offences punishable under Ss. 465 and 467 read with Ss. 109 and 471, Indian Penal Code. The person against whom the complaint has been ordered to be lodged presents an appeal from the order. A right of appeal is given by S. 476-B, Criminal Procedure Code, from the order in question, but it has been objected to by the office that the appeal should be filed on the civil side of this Court and not on the criminal side, in view of r. 37 of the Criminal Rules of Practice and Orders, 1931. The Advocate for the appellant insists that he is entitled to file an appeal on the criminal side. The question is whether his contention is right. The learned Advocate has referred me to several important decisions which bear on the point, namely, *Janardhana Rao* v. *Lakshmi Narasamma*[1], *Dhanpat Rai* v. *Balak*

* Crl. App. No. 80 of 1939. 25th January, 1939.

1. (1933) 65 M.L.J. 873: I.L.R. 57 Mad. 177 (F.B.).

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Rami and *Emperor* v. *Bhatu Sadu*[2]. These Full Bench decisions (and it is unnecessary for me to go beyond them in dealing with a matter of this kind) make it clear that the jurisdiction that is exercised by a Court in filing a complaint under S. 476 is a jurisdiction exercised under the Criminal Procedure Code, and is therefore of a criminal nature. There is no rule that everything done by a Civil Court should be regarded as being of a civil nature. The Civil Procedure Code does not empower a Civil Court to file a complaint and the present complaint is directed to be made ostensibly under a provision of the Criminal Procedure Code. It appears to me that the order of the Court which is now sought to be challenged in a superior Court is an order passed in exercise of criminal jurisdiction; the right of appeal is also provided by another provision in the Criminal Procedure Code. The appeal therefore has to be presented under the Criminal Procedure Code and there is no reason why the appeal which is presented under the Criminal Procedure Code from an order passed in the exercise of a jurisdiction conferred by the Criminal Procedure Code should not be treated as an appeal on the criminal side of this Court. It may be that the rule quoted by the office prescribes a different procedure, but I am not satisfied that that rule is in consonance with law or can affect a right given by a statute, namely, the right of appeal from an order made under S. 476, Criminal Procedure Code, to the Court to which that Court is subordinate. The powers of a Court of appeal in criminal matters is governed by different provisions than in the case of civil appeals, and it is desirable in my opinion that any doubt which remains on the subject should be removed. I am satisfied that cases of this kind including revisions preferred from appellate orders made under S. 476-B of the Criminal Procedure Code are proceedings of a criminal nature and should be therefore filed on the criminal side of this Court and not on the civil side. It is obvious that in the case of Revision Petitions the powers of the Revisional Court would be materially different in criminal cases than in civil cases. What should really count in matters of this kind is not the designation of the Court which makes the order but the character of the jurisdiction exercised in making the order that is sought to be taken to a higher Court in appeal or revision—whether it is of a criminal

1. (1931) I.L.R. 13 Lah. 342 (F B.). 2 I L R (1938) Bom. 331 (F.B.).

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nature or of a civil nature. It cannot for a moment be maintained that an order directing a criminal complaint to be made is one made in the exercise of civil jurisdiction. It is not part of the jurisdiction of Civil Courts as such to prefer criminal complaints. The power to make a complaint is given by the provisions of the Criminal Procedure Code and that shows to my mind that when this power is actually exercised by Civil Courts under S. 476, Criminal Procedure Code, they are really acting in the exercise of a criminal jurisdiction. The appeal should therefore be entertained on the criminal side of this Court.

B. V. V. —— *Order made.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Civil Jurisdiction.]

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE MADHAVAN NAIR AND MR. JUSTICE VARADACHARIAR.

The Commissioner of Income-tax, Madras .. *Petitioner**

v.

P.R.A.L.M. Muthukaruppan Chettiar, Paganeri, Ramnad District .. *Respondent.*

F.B.

Commissioner of Income-tax, Madras *v.* Muthukaruppan Chettiar.

Income-tax Act (XI of 1922), S. 26 (2)—Assessee lending money to another firm—Repayment of loan after three years in British India—Profits whether assessable as amount received in British India.

The assessee carried on business as a money-lender in British India and also at various places outside British India. Until February, 1936, he was a partner in a firm carrying on business at Singapore. In that month the partnership was dissolved and the assessee took over the business. The firm in which he was a partner lent about a lakh of Rupees to another of his outside firms in 1931. In 1934 that amount was repaid with interest then due. The repayment of loan was effected by the debiting of the assessee's personal account in the other firm and crediting his British Indian firm with that amount. This was done in 1935. The Commissioner of Income-tax treated the deposit of the amount in the books as a remittance to British India of profits made by the assessee outside British India and the questions for reference were:

(1) Whether by applying provisions of S. 26 (2) of the Act the assessee should not be considered as having become the sole owner of the debt originally advanced by the firm and whether the sum credited to the British Indian firm was not assessable as realisation of debt by the assessee in British India, and

(2) Whether apart from the applicability of S. 26 (2) in any event the sum advanced more than three years prior to the year of account was not assessable as a return of capital or profits earned more than three years prior to the year of account.

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* O. P. No. 254 of 1937. 14th November, 1938.

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Held, that S. 26 (2) not only fixes the liability but does cover the process of computation of the amount on which tax is to be paid. The assessment must be on the footing that the assessee became the owner of the business on the first day of the year of account. The assessee must be regarded as the lender of the capital and deemed to have received repayment of the loan in British India. Since the amount he received covered both principal and interest, the interest is taxable, but not the principal.

Karuppaswami Moopanar v. *Commissioner of Income-tax, Madras*, (1934) 7 T. I.C. 283, relied on.

M. Patanjali Sastri for the Commissioner (Petitioner).

P. R. Srinivasan for Respondent.

The judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—The assessee carries on business as a money-lender at Paganeri in the Ramnad District and at various places outside British India. Until the month of February, 1936, the assessee was a partner in the firm of P.R.A.M. carrying on business at Singapore. In that month the partnership was dissolved and the assessee took over the business. On the 23rd March, 1931, the P.R.A.M. firm advanced Rs. 1,00,000 to the S.P.K.A. firm of Zigon, Burma. On the 10th February, 1934, the S.P.K.A. firm repaid the loan with the interest then due, in all Rs. 1,22,659. The loan was discharged by payment of the amount to the assessee through the S.P.K.A.A.M. firm of Rangoon. The assessee retained the money in Rangoon, it being held on his behalf by the S.P.K.A.A.M. firm. The repayment of the loan to the P.R.A.M. firm was effected by the debiting of the assessee's personal account in that firm and crediting the Zigon firm with the amount. This was done on the 12th April, 1935. The amount debited to the assessee and credited to the P.R.A.M. firm was actually Rs. 1,26,463, the difference between this sum and the Rs. 1,22,659 representing the interest which had accrued between the 15th October, 1934, when the assessee received the money and the 12th April, 1935, when the loan to the S.P.K.A. firm was closed in the books of the P.R.A.M. firm. The Commissioner of Income-tax has treated the deposit of the Rs. 1,22,659 in the books of the S.P. K.A.A.M. firm as a remittance to British India of profits made by the assessee outside British India and this reference is concerned with the legality of the decision. The questions referred are as follows:

"(*a*) Whether by applying the provisions of S. 26 (2) of the Act the petitioner should not be considered as having become the sole owner of the debt originally advanced by the firm and whether the sum of Rs. 1,22,659 was not assessable as realisation of the debt by the petitioner in British India.

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(b) Whether apart from the applicability of S 26 (2) of the Income-tax Act in any event the sum of Rs. 1,00,000 (out of the sum of Rs. 1,22,659) advanced more than three years prior to the account year was not assessable as a return of capital or profits earned more than three years prior to the account year."

Before us the learned Advocate for the assessee has conceded that the assessee is liable to tax on the Rs. 22,659, the amount of the interest gained on the Rs. 1,00,000 whether S. 26 (2) applies or not.

It will be convenient to take the second question first and its decision does not require much discussion. The assessee had admittedly profits lying to his credit in the books of the Singapore firm in excess of the amount which he retained in Rangoon. The repayment of the assessee by the S.P.K.A. firm in Burma, of course, operated to discharge the S.P.K.A. firm and, if the assessee had remitted the money to Singapore, no question would have arisen. But, instead of sending the money to Singapore, the assessee retained it in Burma for his own purposes and, so far as the P.R.A.M. firm was concerned, the repayment came from his account with that firm. By doing this, the assessee in effect transferred the sum of Rs. 1,22,659 from Singapore to Burma and, as Burma was then within British India, it amounted to a transfer of profits to British India. It has been accepted that, if the amount is to be treated as a remittance of profits, it must be regarded as a sum having been received in British India within three years of the period in which the profits were earned.

The main question is that relating to S. 26 (2) of the Income-tax Act. Both the assessee and the Commissioner of Income-tax say that this section applies to a foreign business of a person who is chargeable to income-tax in British India and the first question referred must therefore be answered on this footing. At the same time I wish to make it clear that in discussing the provisions of S. 26 (2) it must not be taken that we are in fact holding that it does apply to a foreign business. In *V.R.S.A.R. Arunachalam Chettiar* v. *Commissioner of Income-tax, Madras*[1], this Court took the view that the section did apply, but we consider that the question calls for further consideration in a suitable case. The Commissioner of Income-tax contends that S. 26 (2) merely operates to fix the liability for payment of the tax. The assessee, on the other hand, says

1. (1929) 3 I.T.C. 441.

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that it not only fixes the liability, but governs the computation of the tax. In other words, the Commissioner of Income-tax says that the assessment must be based on the method which would apply if the P.R.A.M. firm had continued to be a partnership throughout the year of account, whereas the assessee says that the assessment should be on the footing that he became the owner of the business on the first day of the year of account.

In *Ram Rakha Mal and Sons, Ltd.* v. *Commissioner of Income-tax, Punjab*[1], a bench of the Lahore High Court accepted the opinion put forward by the Commissioner of Income-tax. In the *Commissioner of Income-tax, Bombay* v. *The Masagaon Dock, Ltd.*[2], Rangnekar, J., also read the section in this way, but Blackwell, J., took the opposite view. Beaumont, C.J., answered the reference without dealing specifically with the question, but in *Bhogilal Hargovandas Patel* v. *Commissioner of Income-tax, Bombay Presidency and Aden*[3], the learned Chief Justice sitting with Blackwell, J., regarded the section as covering the method of computation. The reading of the section as the assessee would have it read was accepted by this Court in *S. V. Karuppaswami Mooppanar* v. *Commissioner of Income-tax, Madras*[4] and by the Income-tax authorities in presenting the case. The matter related to the assessment of a person who had continued the business of a partnership. He sought to deduct interest which had been paid on additional capital supplied by the outgoing partners. The Income-tax Officer refused to allow the deduction and the question was referred to the Court. In his statement of the case, the Commissioner of Income-tax observed:

"The plain meaning of the sub-section is that the place of the predecessor as the proprietor of the business during the previous year must be regarded as having been occupied by the successor, the other things remaining the same. Thus during the period of the previous year, the predecessor's capital becomes the successor's capital, the predecessor's acts and transactions the acts and transactions of the successor and the predecessor's profits the profits of the successor. In other words the profits of the business have to be computed as though there had been no change and the profits arrived at treated for assessment purposes as profits made by the successor."

I have quoted this passage in full as Mr. Patanjali Sastri has contended that the Commissioner of Income-tax did not adopt in that case a different attitude to the attitude which he now takes up, but this cannot be accepted. As it was said that the predecessor's capital becomes the successor's capital, the

1. (1936) I.L.R. 18 Lah. 325.
2. A.I R. 1938 Bom. 374.
3. (1935) 9 I.T.C 110
4. (1934) 7 I.T.C. 283.

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Commissioner of Income-tax, Madras v. Muthukaruppan Chettiar.

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predecessor's acts and transactions the acts and transactions of the successor and the predecessor's profits the profits of the successor, the contention was clearly one that the section applied for all purposes and moreover this is shown to be the case in the judgment of Beasley, C.J., who observed:

"The plain reading of the sub-section is, in my opinion, that the predecessor's capital becomes the successor's capital and that for all purposes the succeeding partner is to be regarded as the former firm. I agree with the reasons given by the Income-tax Commissioner for taking the view opposed to that put forward by the petitioner."

The argument put forward by the petitioner in that case was that the loans from the ex-partners should be treated as loans from strangers, whereas the Court decided that the whole of the capital was to be deemed to be the capital of the successor and he could not be allowed deductions by way of interest on his own money. This decision is binding on us and if S. 26 (2) does apply to a foreign business, the section is wide enough to admit of this view. The section says that assessment shall be made on the person succeeding,

"As if he had been carrying on the business, profession or vocation throughout the previous year, and as if he had received the whole of the profits for that year."

The word "assessment" is used in two senses in the Act—the process of determining the amount of profit or loss and the process of levying tax, but, if there is nothing repugnant in the context, the word refers to the process of determining profit or loss. And this is the view of the Income-tax authorities, *vide* the Income-tax Manual (7th Edition), page 159. As the assessment is to be made as if the person had been carrying on the business throughout the year of account and as if he had made the whole of the profits for that year, it is difficult to see how it can be said th .t the sub-section does not include the process of computing the amount on which tax is to be paid. Unless a contrary intention is to be drawn from the section itself, the assessee is entitled to have it read in this way.

The parties having agreed that S. 26 (2) does apply to the present case, and as we hold that it does cover the process of computation, the assessee must be regarded as the lender of the Rs. 1,00,000 to the S.P.K.A. firm and deemed to have received repayment of the loan. The amount which he received covered both principal and interest and as the payment was made to him in British India, the interest is taxable but not the principal.

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Leach, C.

The reference will be answered in the sense indicated and as the assessee has succeeded in the main part of the claim, he will be entitled to his costs, which we fix at Rs. 250, and to the return of the deposit.

K.C. —— *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW AND MR. JUSTICE ABDUR RAHMAN.

Madhavi Ammal v. Subramanian Nambudripad.

K. P. Madhavi Ammal and others .. *Appellants* L. Rs. of Petitioners (Plaintiffs—Petitioners)*

v.

M. Subramanian Nambudripad and others .. *Respondents—Respondents (Defendants 1 and 3 to 13—Respondents).*

Nambudri Act (XXI of 1933), S. 23—Right of a member of a Malabar illom to take her or his share of properties—Vested right—Transfer of share by a member before actual partition good.

The Madras Nambudri Act (XXI of 1932) was an Act to define and to amend, among other things, the law relating to partition applicable to Nambudri Brahmins and S. 23 of the Act gives an unqualified right to every member of the illom to take his or her share of all the properties of the illom over which it has power of disposal. This unqualified right which is given to every member of the illom was really meant to be a right which would vest in the member of the illom who is making the claim in question, separation being of course a necessary concomitant of the claim. It could not have been intended by the legislature that till the Court passed a decree in a suit preferred by any member of the illom, there could be no vested right in the member which could be transmitted by him either by will or otherwise. There seems to be no reason why the rule of law which applies to the Hindus governed by the Mitakshara law, should not apply to Nambudris, namely, that there is a division of status, and, so to speak, a division of title and a proprietary interest vested in the person concerned, the moment he makes an unqualified and unambiguous declaration of his intention to claim his share and separate himself from the family even though such declaration is unilateral.

Kunchi Amma v. *Minakshi Amma*, (1935) 70 M.L.J. 114: I.L.R. 59 Mad. 693; *Subramanyan Tirumurupu* v. *Naraina Tirumurupu*, (1938) 1 M.L.J. 710 and *Krishnan* v. *Narayanan Nayar*, (1938) 1 M.L.J. 715, relied on.

Girja Bai v. *Sadashiv Dhundiraj*, (1916) 31 M.L.J. 455: L.R. 43 I.A. 151: I.L.R. 43 Cal. 1031 (P.C.), referred to.

Appeal against the decree of the Court of the Subordinate Judge of Ottapalam in O. S. No. 6 of 1934.

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* Appeal No. 75 of 1938 and C. R. P. No. 1722 of 1935. 2nd February, 1939.

Madhavi Ammal *v.* Subramanian Nambudripad.

Petition under S. 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Subordinate Judge of Ottapalam dated 23rd August, 1935, in I. A. No. 551 of 1935 in O. S. No. 6 of 1934.

K. P. Krishna Menon and *A. P. Kuttikrishna Menon* for Appellants.

P. Govinda Menon, D. H. Nambudripad, T. N. R. Thirumalpad and *P. Chandrasekhara Menon* for Respondents.

The judgment of the Court was delivered by

Pandrang Row, J.

Pandrang Row, J.—This is an appeal from the decree of the Subordinate Judge of Ottapalam dated the 23rd August, 1935, which dismissed the suit originally instituted by one Bhavatharathan Nambudripad for partition of his share in the property of his illom. He instituted the suit on 20th February, 1934. He executed a registered will seven days later leaving all his property including his share in his illom property to his Nair wife and children. He died on 2nd July, 1935. The Nair wife and children applied to be brought on record as the legal representatives of the deceased plaintiff, claiming to come in as such under the registered will and also as the heirs of the deceased plaintiff under the Marumakkathayam law. That application was dismissed, the Subordinate Judge holding that the right to sue did not survive as there was no severance of status by the mere filing of the suit and that as there was no severance of status, there was nothing to which the legal representatives could lay claim. Not only was the application dismissed but the suit was also dismissed on the ground that the right to sue did not survive, as the sole plaintiff had died. In other words, the learned Subordinate Judge appears to have looked upon the suit for partition as if it was a purely personal action which ceased to survive after the death of the sole plaintiff, and this in spite of the specific provision in the recent legislation giving the right to any member of an illom to claim his share in the illom property. The Madras Nambudri Act of 1932, which is Act XXI of 1933 was an Act to define and to amend, among other things, the law relating to partition applicable to Nambudri Brahmins, and S. 23 of the Act provides distinctly as follows:—

"Any member of an illom male or female may claim to take his or her share of all the properties of the illom over which it has power of disposal and separate from the illom."

Madhavi Ammal v. Subramanian Nambudripad.

Pandrang Row, J.

This unqualified right which is given to every member of the illom was surely meant to be a right which would vest in the member of the illom who is making the claim in question, separation being of course a necessary concomitant of the claim. It could not have been intended by the Legislature that till the Court passed a decree in a suit preferred by any member of the illom, there could be no vested right in the member which could be transmitted by him either by will or otherwise. It is not seriously disputed that if he had chosen to make an alienation of his share during his lifetime the alienee would be entitled to maintain his right to recover the particular share that would have fallen to the deceased alienor. There seems to be no particular reason why the rule of law which applies to the Hindus governed by the Mitakshara law should not apply to Nambudris, namely, that there is a division of status, and, so to speak, a division of title, and a proprietary interest vested in the person concerned the moment he makes an unqualified and unambiguous declaration of his intention to claim his share and separate himself from the family even though such declaration is unilateral.

This was the law as laid down by their Lordships of the Judicial Committee in *Girja Bai* v. *Sadashiv Dhundiraj*[1] beyond any shadow of doubt, though some previous observations of their Lordships had pointed this way. In any case when the Legislature was considering this Nambudri Act of 1932, it must be obvious that it had this well-established rule in its mind when it enacted this S. 23, which gave every member of an illom the right to claim his or her share, that on the making of such a claim he would have a vested right so far as his share of the property was concerned, though that share remained to be ascertained later on, either by mutual agreement or by an order of Court. In our opinion a perusal of the whole of the Chapter relating to partition in this Act XXI of 1933 shows that the interpretation placed upon S. 23 by the Court below cannot be accepted. This question has been already considered in more than one previous case, and it is enough to refer to *Kunchi Amma* v. *Minakshi Amma*[2], *Subramanyan Tirumurupu* v. *Naraina Tirumurupu*[3] and *Krishnan* v. *Narayanan Nayar*[4].

1. (1916) 31 M.L.J. 455: L.R. 43 I.A. 151: I.L.R. 43 Cal. 1031 (P.C.).
2. (1935) 70 M.L.J. 114: I.L.R. 59 Mad. 693.
3 (1938) 1 M L J 710.
4. (1938) 1 M.L.J. 715.

Madhavi Ammal v. Subramanian Nambudripad.

Pandrang Row, J.

These are cases decided by Benches, and the fourth case is one decided by a single Judge and reported in *Madhavi Amma* v. *Nagappan Nair*[1]. All these decisions support the view that the rule which is applied to Hindus governed by the Mitakshara law is a rule that should be applied to the Nambudris governed by the Act even though the Mitakshara as such does not apply to the Nambudris. It is not necessary for our present purpose to enter into a historical disquisition on the subject as to whether this rule was laid down as regards Hindus governed by the Mitakshara because of certain texts in the Mitakshara or the Commentaries subsequent to the Mitakshara or because of certain legal principles which have no necessary connection with the Mitakshara and its successors. The fact remains that the rule was known to be applicable to the Hindus in this presidency barring exceptional classes like Nambudris and Marumakkathayees and so on when the Legislature took up the question of amending the law relating to such excepted classes. It is going too far to say in the absence of any clear statement to the contrary that the Legislature intended that a different rule should apply to these excepted classes whose position was brought into line with that of the other Hindus in the Presidency in several respects including the right of partition. The question has been discussed in the judgments in the cases referred to above and it is not necessary for us to say anything except that we agree with the reasoning and with the decisions in those cases. To our minds a perusal of S. 23 in particular and of the whole Chapter VI of the Act in question is itself sufficient to remove any possible doubt on the subject. It follows from what we have said that this appeal must be allowed and the decree of the Court below dismissing the suit must be set aside and the suit remanded for fresh disposal according to law. In the connected Revision Petition (1722 of 1935) the order sought to be revised is the order dismissing the application of the legal representatives to be brought on record. That revision petition also must be allowed, and it is hereby allowed, and the order of the Subordinate Judge dismissing the petition is set aside and the appellants are permitted to come on record as the legal representatives of the deceased plaintiff in the suit. The

1. (1938) 48 L.W. 868.

appellants are entitled to their costs in the appeal. In so far as the costs in the Court below are concerned, they should be provided for in the revised decree of the Court below. The appellants will be entitled to a refund of the court-fee paid on the memorandum of appeal. There will be no order as to costs in the revision petition.

K.C. —— *Appeal allowed and Civil Revision Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW AND MR. JUSTICE VENKATARAMANA ROW.

Kurella Ramamurti *alias* Sreeramulu and another .. *Appellants* in the Appeal, and petitioners in the C. M. P. (Defendants).*

v.

Nalam Subbarao .. *Respondent in both (Plaintiff).*

Contract—Mortgage—Provision for repayment in eight instalments—Stipulation for repayment of the entire amount carrying compound interest at 12 per cent. per annum in case of default in any instalment—Provision for interest, if penalty.

A mortgage deed provided that the sum of Rs. 2,000 borrowed thereunder should be repaid in eight annual instalments of Rs. 250 each. It further stipulated that in default of repayment of any instalment the entire amount shall become payable at once carrying interest at 1 per cent, per mensem compound with yearly rests,

Held, the provision for compound interest is a penalty and not binding on the mortgagors.

Appeal against the decree of the District Court of East Godavari at Rajahmundry in O.S. No. 46 of 1934 and petition praying that in the circumstances of the affidavit filed herein the High Court will be pleased to direct scaling down of the debt in the said O.S. No. 46 of 1934 according to the provisions of the Madras Agriculturists Relief Act (IV of 1938).

D. Suryaprakasa Rao for Appellants.

P. V. Vallabhacharyulu for Respondent.

The judgment of the Court was delivered by

Pandrang Row, J.—The only point that arises in this case is whether the stipulation for payment of compound interest at

* Appeal No. 171 of 1935 and C. M. P. No. 5029 of 1938.
7th December, 1938.

Ramamurti v. Subbarao.

Pandrang Row, J.

the rate of 12 per cent. per annum found in the suit mortgage deed is in the nature of a penalty and ought to be relieved against. The mortgage deed provided that the sum of Rs. 2,000 which was borrowed thereunder should be repaid in eight annual instalments of Rs. 250 each, such instalments to count both towards principal as well as interest on the entire sum. The stipulation that is objected to runs as follows:—

> "And that in default of payment of sums due in any instalment, the sum remaining unpaid on that date shall be added to the principal and the entire amount become payable at once irrespective of future instalments, the entire sum carrying interest at 1 per cent. per mensem compound with yearly rests."

There was, as it were, a double penalty put upon any default in payment of the annual instalments, namely, the entire sum will become immediately repayable irrespective of future instalments, and secondly interest had to be paid at one per cent. per mensem compound with yearly rests. The latter penalty is, in our opinion, a clear penalty which the parties could not have intended to be enforced as damages for breach of the contract to pay annual instalments. The stipulation in question which requires payment of compound interest at 12 per cent. per annum is therefore not binding on the defendants, the appellants and we think the proper and reasonable provision to make as regards interest is 12 per cent. simple interest as is provided earlier in the document.

The decree of the Court below must be varied in accordance with this finding, namely, by allowing the plaintiff only simple interest at 12 per cent. per annum and not compound interest as claimed in the plaint and allowed by the Court below. In view of the fact that the interest is fairly high and the security was quite good and also in view of the fact that over Rs. 4,000 has actually been paid by the mortgagees to the mortgagor, we are not prepared to award any compensation to the mortgagee except not to interfere with the award of costs in the Court below and not to compel him to pay the costs of the appeal in this Court. Beyond this, we are of opinion the case does not require any award of compensation to the mortgagee. The appeal is allowed as indicated above and the parties will bear their own costs in this appeal.

C. M. P. No. 5029 of 1938, as application filed by the appellants for scaling down the debt under Ss. 8 and 9 of the

Madras Act IV of 1938, will be remitted to the Court below for disposal according to law and the decree in this appeal will be subject to the final orders on that application.

K.C. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VARADACHARIAR AND MR. JUSTICE ABDUR RAHMAN.

Irukulapati Venkateswara Rao, styling himself as Kannaganti Venkateswara Rao .. *Appellant** (*2nd Defendant—Petitioner*)

v.

Vemuri Ammayya and others .. *Respondents* (*Plaintiff and Defendants*).

Hindu Law—Trade started by father in a non-trading family—Debts incurred for such trade—If not binding on the sons.

A debt by a Hindu father in connection with a trade started by himself, when trade was not the normal occupation of the family, cannot be held to be *avyavaharika* debt so as not to bind the sons.

Achutharamayya v. *Ratnajee Bhootaji*, (1925) 50 M.L.J. 208: I.L.R 49 Mad. 211, is not in this respect to be deemed to be overruled by *Benares Bank Ltd.* v *Hari Narain*, (1932) 63 M.L.J. 92: L.R. 59 I.A. 300: I.L.R. 54 All. 564 (P.C.).

Appeal against the decree of the Court of the Subordinate Judge of Tenali in O. S. No. 9 of 1931.

P. Satyanarayana for Appellant.

K. Kottayya for Respondents.

The judgment of the Court was delivered by

Varadachariar, J.

Varadachariar, J.—The second defendant appeals against a preliminary decree for sale passed by the lower Court on foot of a mortgage-deed (Ex. A) executed on 10th March, 1926, by the first defendant for himself and as guardian of his then minor son the second defendant. The mortgage deed had been executed to secure repayment of a sum of Rs. 10,000 made up of Rs. 2,429-3-3 then due to the plaintiff himself on promissory notes that had been executed by the first defendant and of a sum of Rs. 7,570-12-9 recited to have been received in cash by the first defendant for discharging debts that had been contracted by him from others. The first defendant contended that Ex. A was supported by consideration only to the extent of

* App. No. 82 of 1935 and C.M.Ps. Nos. 4674 and 4675 of 1938. 9th December, 1938.

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Rs. 2,429-3-3 and that as regards the balance, the statement of cash payment in Ex. A was not true and that the understanding between the parties was that the document should serve as security for any amounts for which the plaintiff might ultimately become liable in connection with loans which the parties intended to borrow for the benefit of the first defendant, with the plaintiff standing as surety therefor. The second defendant who had attained majority by the date of the suit contended that even as regards the sum of Rs. 2,429-3-3, there was no genuine or binding debt and that in any event the mortgage was not binding upon his share in the family property. At a later stage, a further question was raised by an additional issue, namely, whether the mortgage-deed has been duly attested.

The learned Subordinate Judge held that the bond had been duly attested and that the sum of Rs. 10,000 had been paid as recited in the document and that the cash payment of Rs. 7,570-12-9 paid by the plaintiff to the first defendant at the time of Ex. A had been utilised for discharge of antecedent debts due by the first defendant to other creditors. He accordingly passed a preliminary decree for the sale of the mortgaged property. Before us, the lower Court's finding on the question of attestation has not been challenged nor has any objection been taken to the binding character of the mortgage so far as it related to the sum of Rs. 2,429-3-3 found to be due from the first defendant to the plaintiff on the date of Ex. A.

The learned Counsel for the appellant has directed his arguments mainly to the question of the truth of the plaintiff's story as to the cash advance of Rs. 7,570-12-9 and as to the application of this sum in the discharge of antecedent debts by the first defendant. The decision of both these questions rests to a certain extent on the appreciation of oral evidence. The onus of proof is, of course, on the plaintiff, so far at any rate as he seeks to hold the second defendant's share in the property liable under the mortgage. Besides examining himself, the plaintiff has examined a number of witnesses, some of whom prove that a portion of the money required to be advanced under Ex. A was borrowed from them by the plaintiff just prior to Ex. A and the rest claim to be creditors of the first defendant whose debts were discharged out of the moneys borrowed by the first defendant under Ex. A. As against this body of evidence, there is, on the other side, only the testimony of the

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first defendant who has shown himself to be a very unreliable witness.

There are three documents in the case, besides Ex. A, which lend considerable support to the plaintiff's case. Exs. D and E are two promissory notes executed by the plaintiff on 8th March, 1926, in favour of certain relatives of his and it is the plaintiff's case that as he had not on hand at the time the whole amount required to be advanced under Ex. A, he borrowed part of the amount under these promissory notes. That these notes cannot be a later fabrication is shown by the fact that the first defendant has himself attested them and when confronted with them in the box, the first defendant did not impeach their genuineness. These notes recite in terms that the money was borrowed for the very purpose of being advanced to the first defendant. No reason has been suggested why false recitals should have been put in either in Ex. A or in Exs. D and E. The explanation attempted by the first defendant in respect of these recitals is difficult to understand. At one stage, he suggested that Ex. A was secretly executed, but it does not seem to be part of his case that he had any creditors to cheat at the time. The argument founded on the purchase of the stamp papers for Ex. A in three different names is absolutely disingenuous. The stamp papers were purchased on the same date from the same stamp vendor and as, under the rules, the vendor could not sell to the same person stamps in excess of the value of Rs. 50, the parties found it convenient to purchase three papers in three different names at the same time. It is regrettable that this circumstance should have been pressed into service for a baseless suggestion of fraud. If the understanding was that Ex. A was in part to be security to plaintiff in respect of transactions wherein he might stand surety for the defendant, there was no conceivable reason why it should not have been so recited in Ex. A. As regards the recitals in Exs. D and E, the first defendant suggested that they were put in with a view to enable the plaintiff to escape liability for income-tax. We can only say that it is not easy to understand the suggestion. It is only if money was really due under Ex. A and interest was paid by the debtor on that basis that any question of liability for income-tax or of escaping from it will arise. If no money was due under Ex. A to the extent of Rs. 7,500, there is no point in the parties taking steps to evade payment of income-tax. The

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evidence further shows that Exs. D and E were discharged by the plaintiff by the sale of some of his lands under Ex. F. P. W. 4, the vendee under Ex. F, proves this sale and the payment of money in pursuance thereof to the promisees under Exs. D and E. This witness has not been cross-examined at all on behalf of the defendants. In the face of these documents which prove that the plaintiff did borrow money to advance under Ex. A and subsequently sold some of his lands to pay off the moneys thus borrowed, it is difficult to accept the story of the defendants that Ex. A is not what it purports to be and that no money was in fact advanced on the date of Ex. A as recited therein.

That the first defendant must have had other debts than what he had borrowed from the plaintiff or with his help is shown by his admission that even in connection with his purchases of lands, he has had to borrow moneys and by the admission in his Insolvency Petition Ex. K of the existence of other debts. He is also obliged to admit that he had been carrying on trade at least since 1922. Though as a mere Kamma agriculturist, it would be nothing strange if he did not keep account books, it is hardly likely that he would not have kept accounts in connection with his trade. If these accounts had been produced, they would have shown what debts he had borrowed and how they had been discharged. The learned Subordinate Judge who recorded the evidence of P.Ws. 5 to 8 who claimed to be creditors of the first defendant and deposed to the amounts due to them having been paid out of the money borrowed under Ex. A, accepted their evidence as reliable. It is true that they have not produced any account books or other materials in corroboration of their story; and their inability to remember other transactions entered into by them has also been rightly commented on. But their evidence has got to be read as a whole and in the light of the other circumstances established in the case. We see no reason to differ from the learned Subordinate Judge's view that the plaintiff's version is substantially true.

Some point has been made of the fact that the plaintiff admittedly joined as surety for the first defendant in some of his borrowings after the date of Ex. A. One such transaction was put to him when he was in the witness-box and was admitted by him. Four other notes in which he had joined

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were sought to be filed in the lower Court but were rejected by that Court as not having been produced in time. An attempt has been made to ask us to receive them in evidence. We do not think it proper to admit them in evidence at this stage, as, in view of the allegations in the counter-affidavit, further examination of witnesses will be necessary to appreciate their bearing on the case. We are however willing to proceed on the footing that the plaintiff did accommodate the first defendant in some of his subsequent borrowings. This by itself does not necessarily establish the truth of the first defendant's story as to Ex. A. It is the common case of the parties that the plaintiff and the first defendant were good friends at this time; and seeing that the margin of security afforded by Ex. A was fairly large, it is nothing strange that the plaintiff was prepared to take the risk of accommodating the first defendant in some of his borrowings, without insisting on security. The cordial relations between the parties also seem to account for the plaintiff's failure to insist on delivery to him of the documents discharged by the first defendant from out of the money borrowed under Ex. A. It has been argued that the omission of the plaintiff to refer on earlier occasions in detail to the pre-existing debts of the first defendant now proved through P.Ws. 5 to 8 militates against the truth of that story. But we are not satisfied that any occasion arose before the trial of the suit when the plaintiff need, in the ordinary course, have set forth these details. In the notice which the first defendant issued to the plaintiff in 1929, he denied that Ex. A was supported by cash payment as recited therein to the extent of Rs. 7,570 and the plaintiff merely repudiated this assertion. We do not see that he was at that time called upon to say how exactly this amount had been applied by the first defendant. It was only when the second defendant attempted to impeach the binding character of Ex. A in this suit, that the question of the discharge of antecedent debts assumed importance. We accordingly concur in the finding of the lower Court that Ex. A is fully supported by consideration and that the sum of Rs. 7,570 borrowed in cash under it is shown to have been utilised by the first defendant for the discharge of antecedent debts.

On the above finding, Ex. A would *prima facie* be binding on the second defendant's share as well. But it has been contended on his behalf that as the debts of the first defendant

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were incurred by him in connection with a trade started by himself, when trade was not the normal occupation of the family, the debts must be held to be *avyavaharika* debts and as such not binding on the son. The learned counsel for the appellant admitted that this contention was opposed to the decision in *Achutharamayya* v. *Ratnajee Bhootaji*[1], but he argued that it is supported by the decision of the Privy Council in *Benares Bank, Ltd.* v. *Hari Narain*[2]. We find nothing in *Benares Bank, Ltd.* v. *Hari Narain*[2], that supports this argument. Their Lordships there decided only the question of the binding character of the mortgage *as such* on the footing that moneys had been borrowed contemporaneously with the mortgage for the purpose of carrying on a trade started by the father. They declined to deal with the question of the son's liability for the debt under the pious obligation doctrine, on the ground that the question had not been raised in the Courts in India. We have been asked to say that the decision in *Achutharamayya* v. *Ratnajee Bhootaji*[1], as to "commercial" debts is opposed to the Hindu law texts. We are not prepared to accede to this contention. All that could be said against it is based upon an ambiguous text of Gauthama which has been differently read and variously interpreted by different commentators. It is too much at this time of the day to ask the Court to hold that *all debts* borrowed for purposes of trade by a Hindu father are *avyavaharika* debts. The fact that on another question, the decision in *Achutharamayya* v. *Ratnajee Bhootaji*[1], must be deemed to have been overruled by the decision in *Benares Bank Ltd* v. *Hari Narain*[2] does not affect the present question.

The appeal fails and is dismissed with costs. The court-fee payable on the memorandum of appeal will be paid by the appellant.

C. M. Ps. Nos. 4674 and 4675 of 1938 are dismissed.

C. M. P. No. 4676 of 1938 is an application under the Madras Agriculturists' Relief Act for scaling down the debt. The counter-affidavit filed by the first respondent denies that the applicant is an agriculturist. The affidavit filed in support of this application is too meagre to be acted on. The petitioner will, within a fortnight, file a more detailed affidavit stating the grounds on which he claims to be an agriculturist within the

1. (1925) 50 M.L.J 208 : I L.R. 49 Mad. 211.
2. (1932) 63 M.L J. 92: L.R. 59 I A. 300: I.L.R. 54 All. 564 (P.C.).

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meaning of the Act and also whether even his father, the first defendant, is claimed by him to be an agriculturist within the meaning of the Act.

K. C. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Appellate Jurisdiction]

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE MADHAVAN NAIR.

C.S. Nataraja Pillai and another .. *Appellants* (Defendants)*

v.

C.S. Subbaroya Chettiar .. *Respondent (Plaintiff).*

Nataraja Pillai v. Subbaroya Chettiar.

Foreign judgment—Declaration that a person is the adopted son of a Hindu widow—If binding in a suit relating to immovable property in British India—Analogy to judgment in rem*—Comity of nations—Succession Act—Applicability to estates of Hindus domiciled abroad.*

The Indian Succession Act must not be deemed to apply to the estate of Hindus who are domiciled abroad.

Khatubai v. *Mahomed Haji Abu,* (1922) 44 M.L.J. 35: L.R. 50 I.A. 108: I.L.R. 47 Bom. 146 (P.C.).

Venkatappayya v. *Venkata Ranga Row,* (1919) 38 M.L J. 149: I L.R. 43 Mad 288 [on appeal to Privy Council, *Venkatappayya* v *Venkata Ranga Row,* (1928) 56 M.L.J. 218: L.R. 56 I.A. 21: I.L.R. 52 Mad 175 (P.C.)] referred to.

The judgments of the French Courts declaring that the respondent is the validly adopted son of a Hindu widow (under the French Law a Hindu widow can adopt a son to herself) cannot be regarded as a judgment *in rem* within the meaning of S. 41 of the Evidence Act. But a declaration by a Court affecting the status of a person domiciled within its territory is treated by the comity of nations as being analogous to a judgment *in rem,* and governs succession to movable property.

Messa v. *Messa,* I.L.R. (1938) Bom. 529, followed.

Where the law requires the personal law to be followed no reason exists for making any distinction between movable and immovable property.

Pydah Chinna Ramakrishnayya v. *Sri Manyam Mahalakshamma Garu,* (1929) 30 L.W. 691, explained.

Appeal against the judgment and decree of the Honourable Mr. Justice Wadsworth dated 1st December, 1936, and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C.S. No. 596 of 1928.

K. Krishnaswami Aiyangar and *P. R. Ramakrishna Aiyar* for Appellants.

K. Rajah Aiyar and *V. Ramaswami Aiyar* for Respondent.

The judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—In this appeal the Court is called upon to decide the question whether a foreign judgment declaring the

* O. S.A. No. 79 of 1936. 15th November, 1938.

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respondent to be the adopted son of a Hindu widow is binding on the Court in a suit relating to immovable property. On the 26th April, 1891, one Calve Sadasiva Chetti, a French citizen, died in Pondicherry leaving a widow, but no issue. The deceased was a man of considerable wealth and had immovable properties in Pondicherry and in the Madras Presidency. By a will and a codicil dated the 25th July, 1889 and 20th May 1891, respectively, the deceased directed that the bulk of his estate should be devoted to charitable purposes and he appointed five executors and trustees. The will and the codicil were proved both in Pondicherry and in this Court by four of the trustees, but one of them, Calve Krishnaswami Chetti, refused to join in, and in 1892 instituted proceedings in Pondicherry for the removal of the trustees who had proved the will. As the result of this action the trustees were removed in 1906 and fresh trustees were appointed. The final decision was given by the Court of Cassation in Paris. There was also litigation in Pondicherry with regard to the validity of the will and this led in 1917 to a declaration by the French Courts that the will was invalid and that Vasavambal Ammal, the widow, took the Pondicherry assets as on an intestacy. On the 12th December, 1906, Vasavambal Ammal executed in Madras a deed by which she purported to adopt the second respondent. It is said by the appellants that this adoption was invalid as the widow had no authority to adopt. In fact they say that the will should be construed as embodying a prohibition against adoption. They also say that the widow was induced to sign the adoption deed under pressure from the trustees who were removed by the decree passed in Pondicherry. The deed of adoption was registered in Pondicherry and the French Courts have held the respondent to be the adopted son of Calve Sadasiva Chetti and also of Vasavambal Ammal. I will return to the decision of the French Courts later, but as there has been considerable litigation with regard to the estate in this Court it will be convenient first to refer to the suits in Madras.

On the 19th February, 1908, the respondent who was then about four years of age instituted, through Vasavambal Ammal as his next friend, suit No. 49 of 1908 of this Court for a declaration that he was the lawfully adopted son of Calve Sadasiva Chetti and that the will was in consequence invalid. On this basis he asked that he be given possession of the Madras

properties. On the 24th November, 1908, this suit was withdrawn with liberty to bring a fresh suit on the same cause of action. In 1910, the persons who were appointed trustees as the result of the suit filed in Pondicherry by Calve Krishnaswami Chetti in 1892, filed suit No. 312 of 1910 of this Court for a declaration that the respondent's adoption by Vasavambal Ammal was invalid and for possession of the properties situated in Madras. The defendants in this suit were three of the four trustees who had been removed, Krishnaveni Ammal (the respondent's natural mother), Vasavambal Ammal and the respondent. The fourth trustee had died in the meantime. This suit was tried by Sir John Wallis who was then a puisne judge of this Court. Sir John Wallis held that the adoption of the respondent by Vasavambal Ammal was invalid as it was contrary to the provisions of the will and also because the nearest *sapinda* had not been consulted. Accordingly he directed that the properties in the Madras Presidency should be handed over to the plaintiffs. An appeal (O.S.A. No. 72 of 1913) was filed against this judgment and was heard by Abdur Rahim and Phillips, JJ. Abdur Rahim, J., held that the Pondicherry Court had no power to remove the trustees appointed by the Madras Court in respect of immovable properties situated in Madras and in order to remove the old trustees a suit under S. 92 of the Code of Civil Procedure would be necessary. Phillips, J. held that this was not a suit for the removal of trustees. The old trustees had been removed and the plaintiffs had been appointed in their places. This was a suit based upon a foreign judgment which recognised the title of the plaintiffs to administer the trust and to recover the trust properties. He agreed that the adoption was invalid for the reasons stated by Sir John Wallis and also on the ground that the factum of adoption had not been proved. In view of this disagreement a Letters Patent Appeal No. 229 of 1916 followed and was heard by Ayling, Seshagiri Aiyar and Bakewell, JJ, who dismissed the suit on the ground that there was a defect in the appointment of the plaintiffs as trustees and that they therefore had no *locus standi*. No opinion was expressed on the question of the validity of the adoption.

In 1920 Calve Subraya Chetti, son of Calve Krishnaswami Chetti, and two others, with the sanction of the Advocate-General instituted in this Court suit No. 226 of that year for the

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removal of the three surviving trustees who had proved the will in Madras, for the appointment of new trustees and for the settlement of a scheme. The respondent, Krishnaveni Ammal, and Vasavambal Ammal were also made defendants. This suit also resulted in a compromise. The compromise was sanctioned by Kumaraswami Sastri, J., who passed a decree in the terms agreed upon. The respondent gave up his claim to be the adopted son of Calve Sadasiva Chetti. To Krishnaveni Ammal was allotted one item of immovable property in Madras, subject to her paying a sum of Rs. 50,000 to the respondent, and to the widow was allotted the property which is the subject-matter of the suit out of which this appeal arises. The other properties of Calve Sadasiva Chetti in Madras were to be regarded as constituting valid bequests to charities and a scheme for their management was settled. The respondent was still a minor, but the Court considered that it was in his interest that there should be a decree in the terms agreed upon.

Vasavambal Ammal died on the 25th January, 1922. Calve Subbaraya Chetti then claimed to be entitled to the property which was allotted to Vasavambal Ammal under the compromise decree passed in suit No. 226 of 1920 on the ground that he was the reversioner to the estate of Calve Sadasiva Chetti, and purported to transfer it to the Madras trustees for the benefit of the charities mentioned in the will of Calve Sadasiva Chetti, who was his great uncle. Sankara Chetti, one of the trustees who had been removed by the order of the French Court set up a claim to the property as the nearest reversioner of the widow and purported to transfer it to the appellants, who claim to be illegitimate sons of Calve Sadasiva Chetti. In 1924 the Madras trustees filed suit No. 53 of 1924 to recover possession of the property and also of a rest house which had been managed by Vasavambal Ammal. In addition to the appellants, Sankara Chetti, Chockanathan Chetti (who was also one of the original trustees), the then tenant of the property, the respondent, and the person in possession of the rest house were made defendants. In spite of the compromise decree passed in suit No. 226 of 1920 the respondent advanced the claim to be the adopted son of Calve Sadasiva Chetti as well as the adopted son of the widow. This suit was dismissed on the 24th August,

1928 by Kumaraswami Sastri, J., on the ground that Sankara Chetti and not Calve Subraya Chetti was the nearest reversioner of Calve Sadasiva Chetti. Suit No. 696 of 1924 was tried with this suit. Suit No. 696 of 1924 had been filed by the respondent to recover the rest house from the care-taker. The respondent claimed the right to possession of the rest house as the adopted son of the widow, but without prejudice to his claim that he was also the adopted son of Calve Sadasiva Chetti. This suit was decreed by Kumaraswami Sastri, J., on the 5th September, 1928, on the ground that the respondent had been validly adopted to Vasavambal Ammal according to French law by which she was governed. The learned Judge left open the question of the respondent's adoption to the testator.

In suit No. 591 of 1928 of this Court Sankara Chetti sought to recover from Krishnaveni Ammal possession of the property which had been allotted to her under the decree in suit No. 226 of 1920. Sankara Chetty claimed to be entitled to the property as the nearest reversioner of Calve Sadasiva Chetti. He also claimed the right to manage the rest house. The suit came before Krishnan Pandalai, J., who dismissed it on the ground that the respondent was the validly adopted son of Vasavambal Ammal. The Court also held that Sankara Chetti could not challenge the adoption to Calve Sadasiva Chetti as Sankara Chetti had been instrumental in bringing it about.

In 1930 the respondent instituted in this Court suit No. 257 of 1930 to set aside the compromise decree passed in suit No. 226 of 1930. The defendants were the Madras trustees. The respondent again claimed that he had been validly adopted both to the husband and the wife and that he was entitled to their estates. This suit was also compromised. The decree passed in suit No. 226 of 1920 was confirmed subject to the payment to the respondent of Rs. 1,000 plus a like sum for costs and the payment by the trustees of Rs. 35 per mensem for his maintenance.

I will now return to the litigation in Pondicherry. I have already mentioned that in 1906 the trustees who had proved the will were removed and this led to the appointment of new trustees under the provisions of the will. In 1917 it was held by the Court of Appeal at Pondicherry that the bequests to

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charities were invalid because the sanction of the Administration had not been obtained before the will was executed, and it was further held that in the absence of any other heir the widow took the French estate subject to certain non-charitable legacies. In 1920 Calve Subraya Chetti filed a suit in Pondicherry for a declaration that he was the reversioner to the estate of Calve Sadasiva Chetti. The defendants in this suit were the widow and the respondent. The adoption was challenged but the Court of first instance held that the respondent had been validly adopted both to the testator and to Vasavambal Ammal and ordered that all those who were in possession of the properties left by the testator should deliver them up to the respondent. The judgment, of course, did not apply to properties which were made the subject of non-charitable legacies. The judgment was upheld on appeal by the Court of Appeal in Pondicherry and also by the Court of Cassation on second appeal. Therefore, so far as the French law is concerned the respondent is the heir both of Calve Sadasiva Chetti and of his widow and the French Courts have given him a declaration of his status.

The suit out of which this appeal arises was filed on the 5th November, 1928, to recover the property which was allotted to Vasavambal Ammal under the compromise decree in suit No. 226 of 1920. The respondent claimed title to the property both as the adopted son of Calve Sadasiva Chetti and of Vasavambal Ammal. The suit was tried by Wadsworth, J., who held that it was no longer open to the respondent to set up his adoption to Calve Sadasiva Chetti, this claim having been abandoned in suit No. 226 of 1920 and suit No. 257 of 1930, but it was open to him to claim to be the adopted son of Vasavambal Ammal. The learned Judge held that the adoption by the widow had been proved, and as she was governed by French law the adoption was valid. Accordingly he granted the respondent a decree for possession. In holding that the adoption of the respondent was valid the learned Judge relied on the documentary evidence (the deed of adoption and a deed of gift executed by Vasavambal Ammal in which reference is made to the adoption) and on the judicial recognition of the respondent's status. The appellants have conceded in this Court that under French law a Hindu widow can adopt a son to herself and that if she does her adopted son succeeds to her

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estate, but they say that the documentary evidence does not prove that there was a giving and a taking and that the requisite ceremony was performed and therefore it is not sufficient to prove that there was a valid adoption. They contend that this Court cannot have regard to the declaration of status given to the respondent by the French Courts or to the decisions of Kumaraswami Sastri, J. and Krishnan Pandalai, J. For reasons which I shall state I consider that this Court must accept the declaration of the French Courts that the respondent is the adopted son of Vasavambal Ammal and therefore it is not necessary to inquire further into the matter.

Before stating the reasons for holding that the Court must accept the declaration of status by the French Courts I will deal with an argument advanced by the learned Advocate for the appellant that succession to the estate of Vasavambal Ammal is governed by the Succession Act which does not recognise adoption. It is said that in declaring in S. 4 that Part II of the Act shall not apply if the deceased is a Hindu, Mahomedan, Buddhist, Sikh or Jaina and in S. 29 that Part V shall not apply to an intestacy or to the property of any such person the Legislature could have only in its contemplation Hindus, Mahomedans, Buddhists, Sikhs and Jainas who are domiciled in British India because a country can only legislate for its own citizens and therefore when a Hindu domiciled abroad dies leaving property in British India the Act applies because the estate is not within the exception. The Courts of this country have always applied the personal law of a Hindu who has migrated from one part of India to another and in the case of *Khatubai* v. *Mahomed Haji Abu*[1], the Privy Council applied the personal law of a Halai Memon domiciled outside British India in the matter of succession to immovable property within British India. The deceased was domiciled in Porebunder in Kathiawar which is a Native State. He had carried on business for many years in Bombay and died leaving immovable property there. In matters of inheritance and succession the Halai Memons of Porebunder follow the Hindu and not the Mahomedan law and in that respect differ from the Halai Memons of Bombay who have adopted the Mahomedan law. The question was whether the deceased's son took the

1, (1922) 44 M.L.J. 35: L.R. 50 I.A. 108. I.L.R. 47 Bom. 146 (P.C.).

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whole of his estate to the exclusion of his daughter as under Hindu law. The Judicial Committee held that the succession was governed by the personal law of the deceased which was the law of the Halai Memons of Porebunder and not by the personal law of the Halai Memons of Bombay. In *Balwant Rao* v. *Baji Rao*[1], the Privy Council stated that it was established that the law of succession was in any given case to be determined according to the personal law of the individual whose succession was in question. This case, however, related to a Maharashtra Brahmin domiciled in the Bombay Presidency leaving immovable property in the Central Provinces and is therefore not so much in point as *Khatubai* v. *Mahomed Haji Abu*[2]. The latter case is directly in point and decides the question.

The argument of the learned Advocate for the appellant would appear to be based on observations by Wallis, C. J., in *Venkatappayya* v. *Venkata Ranga Rows*[3], where he said that the limits of legislative authority are territorial, and the Indian Legislature in particular has authority to legislate only for British India and British subjects in Native States. *Prima facie*, therefore, its enactments are not to be construed to apply to acts done outside British India even by British subjects. In that case the Court held that the Indian Registration Act did not apply to authorities to adopt executed in Native States by domiciled subjects of those states and such documents being valid and admissible in British India a person adopted in pursuance of an authority executed in the Nizam's dominions was entitled to inherit the separate properties of his adopted mother's father situated in British India. The case was carried to the Privy Council, *Venkatappayya* v. *Venkata Ranga Row*[4]. Their Lordships held that the document in question had been duly registered, and did not consider it necessary to discuss:

> "The important but somewhat abstruse question, whether the respondent being at that time resident in and a subject of the state of the Nizam, could rely upon the unquestioned fact that his status as an adopted child was accepted by the Courts in the Nizam's dominions, as a binding decision on the question of his status, precluding all dispute as to the fact and lawfulness of his adoption."

Consequently the Privy Council left open the specific question whether the declaration of a foreign Court on the

1. (1920) 39 M.L.J. 166: L.R. 47 I.A. 213: I.L.R. 48 Cal. 30 (P.C.).
2. (1922) 44 M.L.J. 35: L.R. 50 I.A. 108: I.L.R. 47 Bom. 146 (P.C.).
3. (1919) 38 M.L.J. 149: I.L.R. 43 Mad. 288.
4. (1928) 56 M.L.J. 218: L.R. 56 I.A. 21; I.L.R. 52 Mad. 175 (P.C.).

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question of adoption is binding on Courts in British India, but its decision in *Khatubai* v. *Mahomed Haji Abu*[1], negatives the argument that the Succession Act must be deemed to apply to the estates of Hindus who are domiciled abroad.

Coming now to the main question it must be accepted that the judgments of the French Courts declaring that the respondent is the validly adopted son of Vasavambal Ammal cannot be regarded as judgments *in rem* within the meaning of S. 41 of the Evidence Act. But a declaration by a Court affecting the status of a person domiciled within its territory is treated by the comity of nations as being analogous to a judgment *in rem* as was pointed out by the Bombay High Court in the recent case of *Messa* v. *Messa*[2] and governs succession to movable property. Immovable property stands on a different basis and international law does not recognise any power in a Court to adjudicate upon the title or the right to the possession of immovable property situate outside the country of the Court. Chattels can be taken away but land cannot. But in recognizing only the personal law of Hindus, Mahomedans, Buddhists, Sikhs and Jainas in matters of succession British India has added an exception to the general principle that the *lex situs* must be applied in questions relating to immovable property and this is pointed out in "Mayne on Hindu Law and Usage, 10th edition, page 96". The *lex situs* is the Succession Act and the Succession Act does not apply to a Hindu, Mohammadan, Buddhist, Sikh or Jaina even when he is domiciled outside British India. So far as such persons are concerned the governing factor is the personal law.

Inasmuch as the Courts of British India recognise the validity of a declaration of status by a foreign Court in a matter of succession to movable property in British India because the personal law applies, it seems to me that they must do the same in a matter of succession to immovable property where the law requires the personal law to be followed. No reason exists for making any distinction. Treating the personal law as part of the *lex situs* the Courts of the country of domicile are best able to decide questions of status.

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1. (1922) 44 M.L.J. 35: L.R. 50 I.A. 108: I.L.R. 47 Bom. 146 (P.C.).
2. I.L.R. (1938) Bom. 529.

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In *Pydah Chinna Ramakrishnayya* v. *Sri Manyam Mahalakshamma Garu*[1], Phillips and Reilly, JJ., held that British Indian Courts had no jurisdiction to entertain a suit for a declaration that an adoption which was made in French territory was not valid according to French law, and the fact that there was in British India immovable property belonging to the estate would not invest the Court with jurisdiction to entertain the suit. It appeared from the evidence in the case that the French law as to adoption and as to a Hindu widow's rights in property was not on all fours with the law as administered in British India. The Court considered that the contesting defendants being French subjects were entitled to have the question of status determined according to the law prevailing in the country in which they were domiciled and for a foreign Court to usurp jurisdiction in such a matter was highly undesirable. The Court added that it might be necessary (it did not say that it would be necessary) in litigation with regard to property situated in British India to decide such questions, but it refused to entertain a mere declaratory suit. The decision is not in conflict with the opinion I have expressed but rather lends support.

For the reasons indicated I hold that this Court must accept the declaration of the French Courts that the respondent was lawfully adopted by Vasavambal Ammal and that as the property in suit belongs to her estate the respondent is entitled to possession of it. My learned brother shares this view and the appeal will therefore be dismissed with costs. We certify for two Counsel.

Appeal dismissed.

K. C.

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1. (1929) 30 L.W. 691.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Appellate Jurisdiction.]

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE MADHAVAN NAIR.

T. Muhammad Shamsudin Ravuthar and Brothers .. *Appellants** (*Defendants*)

v.

Messrs. Shaw, Wallace and Company and others .. *Respondents* (*Plaintiffs*).

Muhammad Shamsudin Ravuthar *v.* Messrs. Shaw, Wallace & Co.

Principal and agent—Liability—Proof of claim in the Insolvency of agent—If a claim against principal precluded.

In a claim against principal and agent the law of England and the Straits Settlement,—that a judgment signed against one defendant was conclusive evidence of election not to proceed against the other,—expounded in *Morel Brothers & Co.. Ltd.* v. *Earl of Westmorland,* (1904) A.C. 11; *Moore* v. *Flanagan & Wife,* (1920) 1 K.B. 919 and *Firm of R M. K. R. M.* v. *Firm of M. R. M. V. L.,* (1926) A.C. 761, is not applicable to India. There is in India a statutory provision (Indian Contract Act, S. 233) allowing a plaintiff to sue both the principal and the agent in a case where the agent is personally liable.

Kuttikrishnan v. *Appa Nair,* (1926) 51 M.L.J. 311: I.L.R 49 Mad. 900, dissented from.

Quaere.—If proof in insolvency amounts to a judgment for the purposes of the doctrine of election.

On appeal from the decree and judgment of the Honourable Mr. Justice Wadsworth, dated the 7th day of May, 1936 and passed by the High Court in its Ordinary Original Civil Jurisdiction in C. S. No. 173 of 1931.

The Advocate-General and *T. L. Venkatarama Aiyar* for Appellants.

V. V. Srinivasa Aiyangar and *R. Sundararajan* for Respondents.

The judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—The appellant firm and the firm of M.A.P. Mohammad Hussain Ravuthar and Sons (now represented by the Official Assignee, the third respondent) were defendants in a suit instituted on the Original Side of this Court by the first and the second respondent firms. The first respondents are a firm of European merchants carrying on business in Madras. The second respondents are their "guarantee brokers" which means that for consideration they guarantee to the first respondents the fulfilment of the obligations of those contracting with

* O. S. A. No. 49 of 1936 29th September, 1938.

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them. The appellants are manufacturers of brass and copper articles and carry on their business at Pettai, Tinnevelly. The firm of M.A.P. Mohammad Hussain Ravuthar and Sons (for the sake of convenience I will hereafter refer to this firm as "the M.A.P. firm") were merchants and commission agents carrying on business at Pettai, Madras and Bombay with their head office at Pettai. The suit was filed to recover a sum of Rs. 16,940-11-10 in respect of contracts entered into by the M.A.P. firm with the first respondents for the purchase of brass sheets. Of this sum Rs. 1,008-10-5 represented a claim for damages for breach of a contract dated the 22nd January, 1930, the balance representing the price of goods sold and delivered under earlier contracts. The figures are not in dispute and the liability of the M.A.P. firm is admitted, but as they were insolvents and a decree against them alone would be infructuous it was sought to make the appellants also liable. The plaintiff-respondents alleged that the appellants through their principal partner one Mohammad Shamsudin Ravuthar had guaranteed the liabilities of the M.A.P. firm. This was their main contention in the Court below, but they advanced other pleas which may be summarised as follows:—(1) The business of the M.A.P. firm was really the business of the appellants. (2) If the business of the M.A.P. firm did not belong to the appellants absolutely, the members of the appellant firm must be regarded as partners in the M.A.P. firm. (3) In any event, the M.A.P. firm acted as the agents of the appellants for the purposes of the contracts with the first respondents.

The case was tried by Wadsworth, J., who held that the alleged guarantee had not been proved, but granted a decree against the appellants on the ground that they were principals and that the M.A.P. firm were merely their agents. Although he did not say so the learned Judge seems to have treated the appellants as undisclosed principals. The appellants deny that the M.A.P. firm were their agents. They say that the M.A.P. firm dealt with the first respondents as principals and that they had nothing to do with the contracts. The plaintiff-respondents contend that the learned Judge erred in holding that the guarantee had not been proved. They maintain that the appellants and the M.A.P. firm are really one and the same firm, but, if not, the appellants are liable as the contracts were entered into by the M.A.P. firm as the agents of the appellants. The plea of

partnership has been abandoned in this Court, but the appeal throws open all questions, except that of partnership.

The appellant firm consists of three brothers, Mohammad Shamsudin Ravuthar, Mohammad Ghanni and Peer Mohideen. The M.A.P. firm was founded many years ago by one M.A.P. Mohammad Hussain Ravuthar, the brother-in-law of the partners in the appellant firm. When the M.A.P. firm was started the appellant firm had not been constituted. Mohammad Hussain Ravuthar had with him as his partners his two sons, Mohammad Yusuf Ravuthar and Mohammad Abu Bakar Ravuthar. The business was that of general merchants and commission agents. Mohammad Hussain Ravuthar died on the 1st December, 1927, when his sons were aged 32 and 28 years respectively. After the father's death the sons carried on the business. The M.A.P. firm supplied goods to the appellants as principals and also as commission agents. It is the appellants' case that in so far as brass and copper sheets were concerned the M.A.P. firm were the actual sellers, unless such goods were obtained from Bombay in which case they were supplied on a commission basis. It is clear that from 1925 onwards the M.A.P. firm had not sufficient capital to finance their contracts with the appellants. The result was that the appellants had to make advances to the M.A.P. firm. At the end of the financial year in 1926 the books of the M.A.P. firm showed that the appellants were creditors for the sum of Rs. 16,338-13-4. At the end of 1927 the M.A.P. firm owed the appellants Rs. 10,433-4-7; at the end of 1928, Rs. 27,432, and at the end of 1929 Rs. 21,235-6-9 The partners of the M.A.P. firm were adjudicated insolvents on the 24th April, 1930, and at that time they were indebted to the appellants in the sum of Rs. 15,421-10-3 in respect of advances made. The appellants have in fact proved in the insolvency as creditors for this sum.

It is admitted that according to the books of the respective firms the M.A.P. firm bought as principals brass and copper sheets and sold a large proportion of their purchases to the appellants. The learned Advocate-General has prepared a statement from the Exhibits showing the total purchases by the M.A.P. firm of brass sheets from 1926 to 1929 and the brass sheets they sold to the appellants. In 1926 the M.A.P. firm bought 820 bundles of which they sold 638 bundles to the appellants. In 1927 they bought 935 bundles and sold to the appell-

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lants 618 bundles. In 1928 the total purchases were 975 bundles of which the appellants took 625 bundles. In 1929 the M.A.P. firm bought 934 bundles and sold to the appellants 821 bundles. In most cases the M.A.P. firm sold to the appellants at a profit, but in some cases they sold at a loss. The two firms kept separate books of account and at the end of each financial year they prepared their own profit and loss statements. There is no evidence that the appellants ever shared in the profits of the M.A.P. firm or contributed to its losses, or that the M.A.P. firm had any share in the business of the appellants. So far as the books are concerned the two businesses were entirely independent. At the end of each financial year the appellants and the M.A.P. firm exchanged statements showing the amounts due by one firm to the other in respect of the transactions during the year and in every case interest was charged on outstanding sums. Before the suit was filed it was never contended that the appellants had any interest in the business of the M.A.P. firm or that they were in any way liable in respect of the contracts in suit.

With this statement of the facts I will turn to the question whether the appellants through their senior partner Shamsuddin guaranteed the liabilities of the M.A.P. firm. The evidence in support of this contention is that of Motilal, a partner in the second respondent firm and of J. E. Waterfield, an assistant in the first respondent firm who was examined on commission. Motilal states that in the month of December, 1927, that is shortly after the death of Mohammad Hussain Ravuther, he met Shamsuddin in the office of the first respondent firm and that Shamsuddin then gave the alleged guarantee. I should mention that the first respondents did business with the M.A.P. firm in 1925 and 1926, but the business was discontinued in 1926, because the M.A.P. firm failed to fulfil their obligations. According to Motilal an agent of the M.A.P. firm was present at his interview with Shamsuddin, but he could not give the name of the agent. He admits that Shamsuddin only spoke Tamil and he only Hindustani. He says that the agent interpreted in Hindustani, but he is silent on the question whether the agent understood Tamil. Motilal says that he asked Shamsuddin to give the guarantee in writing, but he refused to do so. Mr. Waterfield admittedly never saw Shamsuddin. His recollection was that the second respondents

told his firm that they could do business with the M.A.P. firm on a credit basis because some one had offered to guarantee the M.A.P. firm. So far as Mr. Waterfield was concerned, the question was really one for the second respondents as the guarantee brokers, the first respondents merely looked to their guarantee brokers to safeguard their business with the M.A.P. firm. Shamsudin denies that he ever had an interview with Motilal, but we are not prepared to accept this denial. Something must have happened to induce the second respondents to guarantee the performance by the M.A.P. firm of their obligations to the first respondents. We consider that Motilal and Shamsudin had a conversation and as the result of that conversation business was resumed between the M.A.P. firm and the first respondents, but it does not follow that a guarantee was in fact given. The plaintiff-respondents maintain that the appellants were really the proprietors of the M.A.P. firm. If this were in fact the case it is difficult to see why Shamsudin would refuse to give a written guarantee. Shamsudin's firm were financing the M.A.P. firm and we have no doubt that Motilal knew this. It is part of the business of a guarantee broker to find out the positions of these dealing with the principals. We consider that it is very likely that Shamsudin told Motilal that the first respondents might safely do business with the M.A.P. firm as he was helping them with finance and taking goods from them, but this would fall far short of a guarantee. In face of the admitted refusal of Shamsudin to give a guarantee in writing and the fact that it has not been proved that that the interpreter was in a position to make Shamsudin and Motilal fully understand each other, we are constrained to hold that the alleged guarantee has not been proved. It follows that we concur in the finding of the learned trial Judge on this issue.

With regard to the question whether the appellants and the M.A.P. firm are really one organisation I have already mentioned that the books themselves point altogether the other way and the admitted facts support the books. The plaintiff-respondents here have relied on correspondence which shows that the appellants were financing the M.A.P. firm for the purposes of their contracts and that the M.A.P. firm were writing informing the appellants of market rates and asking whether they should do business at those rates. The plaintiff-respondents, however, refused to go to the length of saying that the two firms were

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in reality one and the same firm before the death of Mohammad Hussain Ravuthar. The contention is that the business of the M.A.P. firm must be regarded as belonging to the appellants from the death of Muhammad Hussain Ravuthar because of the financial aid rendered. Yet it is quite clear that before his death the appellants were financing the M.A.P. firm just in the same way. The appellants had to acquire brass and copper sheets for the purpose of their business, and there is nothing extraordinary in the fact that they got their requirements through the firm carried on by their nephews and that they rendered them financial assistance when required. Nor is there anything suspicious in the fact that the M.A.P. firm were in the habit of sending market quotations to the appellants. The M.A.P. firm carried on business as commission agents as well as that of sellers. If they dealt as principals their invoiced price left a margin of profits for themselves in most cases, but sometimes they had to sell even at a loss. When buying for the appellant firm as agents they always charged commission. To ask the Court to hold that the appellants and the M.A.P. firm formed the same organisation merely because the appellants lent financial assistance to the M.A.P. firm in asking far too much, and on the evidence we must hold that the appellant firm and the M.A.P. firm were separate entities.

The question which remains to be considered is whether the M.A.P. firm acted in the transactions in suit as agents for undisclosed principals, but before alluding to the facts it is necessary to deal with a legal argument advanced by the learned Advocate-General on behalf of the appellants. He says that it is not open to the plaintiff-respondents to contend that the appellants were principals because the second respondents had already proved in insolvency against the M.A.P. firm. He says that the doctrine of election here comes in and the proof in insolvency amounts to obtaining a judgment against agents which precludes a suit being subsequently maintained against their principals. In this connection he has cited *Morel Brothers & Co., Ltd.* v. *Earl of Westmorland*[1], *Moore* v. *Flanagan and Wife*[2] and *Firm of R.M.K.R.M* v. *Firm of M.R.M.V.L.*[3] In the case in *Morel Brothers & Co., Ltd.* v. *Earl of Westmorland*[1],

1. (1904) A.C. 11. 2. (1920) 1 K.B. 919.
3. (1926) A.C. 761.

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the House of Lords held that a judgment signed against one defendant was conclusive evidence of an election not to proceed against the other, and following this decision the Court of Appeal in *Moore* v. *Flanagan and Wife*[1], held that the plaintiff having signed judgment against the agent could not afterwards recover judgment against the principal in respect of the same debt. The case of *Firm of R.M.K.R.M.* v. *Firm of M. R. M. V. L.*[2], was decided by the Privy Council on an appeal from a judgment of the Supreme Court of the Straits Settlements. A judgment had been obtained against the agent of a local money-lending firm, but in a subsequent suit it was sought to make the firm liable. The Judicial Committee, however, held that the second suit did not lie. These decisions expound the law of England and of the Straits Settlements, but it does not necessarily follow that the law in British India is the same. We are here governed by the provisions of the Indian Contract Act, and S. 233 of that enactment states that in cases where the agent is personally liable, a person dealing with him may hold either him or his principal, or both of them liable. An illustration is given to the section and it is in these words:

"*A* enters into contract with *B* to sell him 100 bales of cotton, and afterwards discovers that *B* was acting as agent for *C*. *A* may sue either *B* or *C*, or both, for the price of the cotton."

Therefore, there is in India a statutory provision allowing a plaintiff to sue both the principal and the agent in a case where the agent is personally liable. In *Kuttikrishnan Nair* v. *Appa Nair*[3], Coutts-Trotter, C.J., expressed the opinion that the section could only be construed as meaning that the plaintiff might sue both the principal and the agent in the alternative, but he could not get judgment against both of them jointly for the amount sued for. I find myself unable to accept the construction. There is no ambiguity in the language used in the section and I am unable to see anything unreasonable in the rule which it embodies. What would be the position if a suit is brought against the principal after judgment had been obtained against the agent in an earlier suit is another matter but we are not called upon to consider that question here. Even if proof in insolvency amounted to a judgment for the purposes of the doctrine of election—I express no opinion on the point—it

1. (1920) 1 K.B. 919. 2. (1926) A.C. 761.
3. (1926) 51 M.L.J. 311 : I.L R. 49 Mad. 900.

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appears that the action which the second respondent took in the Insolvency Court was entirely without prejudice to the rights of the parties in this suit. For these reasons we reject the argument of the learned Advocate-General that it is not open to the plaintiff-respondents to advance in this suit the plea that the appellants were principals.

The learned Advocate-General is, however, on much firmer ground when he says that the evidence does not warrant the conclusion that the M. A. P. firm were agents of the appellants. As I have already pointed out the M.A.P. firm dealt with the first respondents as principals and they sold to the appellants as principals. The books and the course of dealing are entirely inconsistent with the suggestion that the M.A.P. firm were acting as agents of the appellants. But there is also a letter which shows that the two firms were distinct. On the 29th May, 1928, the Madras Agents of the M.A.P. firm when writing to the appellants at Pettai in respect of a shipment of brass sheets enclosed the bills of lading and asked that as soon as they were received by the appellants they should take "the signature of the principal and do the needful". The principal was the M.A.P. firm in Pettai.

The learned trial Judge observed that if the M.A.P. firm were merely selling to the appellants it is inconceivable that the appellants would have been a large creditor of the M.A.P. firm. Considering that the partners in the appellant firm were the uncles of the partners in the M.A.P. firm there is nothing extraordinary in this financial aid. Moreover the appellants were requiring brass sheets for their own business and if they wanted to secure their requirements from the M.A.P. firm, which was only natural considering the relationship, they had to finance the transactions. They had to finance transactions at a time when the two firms were deemed by the appellant-respondents to be distinct. The learned trial Judge considered that the action of the M.A.P. firm in quoting market prices to the appellants firm, not their own selling prices, and asking for instructions regarding the placing of orders was evidence that they were acting as agents. We do not view the position in this light as I have already indicated. There was undoubtedly a close connection between the two firms, but there is no evidence which in our opinion justifies the conclusion that the M.A.P. firm acted in

these transactions as agents for the appellants. In fact we regard the evidence as pointing directly the other way.

For these reasons we allow the appeal and the suit will be dismissed with costs both in this Court and in the Court below against the plaintiff-respondents.

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K.S. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE LAKSHMANA RAO.

Gurunathaswami Koil at Anuppanadi by Manager Kodi P. Muthirulappa Pillai at Anuppanadi, Madura .. *Appellant** (*Plaintiff*)

v.

Alangaram Pillai (died) and others .. *Respondents* (*Defendants and L. Rs.*).

Gurunathaswami Koil *v.* Alangara Pillai.

Civil Procedure Code (V of 1908), S. 92—Applicability—Newly appointed trustee—Suit against ex-trustee for recovery of property—Prayer for account also included—Sanction under S. 92 if necessary.

Where a person who claimed to be the newly appointed trustee of a temple sued for the recovery of the movable properties of the temple including cash after taking an account of the trust money received by the defendant, the previous trustee, who was stated to have been lawfully removed by the members of the community,

Held, that the suit was not bad for want of sanction under S. 92 of the Code of Civil Procedure.

Venku Chettiar v. *Doraisami Chettiar*, (1921) 14 L.W. 38; *Appanna Poricha* v. *Narasinga Poricha*, (1921) 41 M.L.J. 608: I.L.R. 45 Mad. 113 (F.B.) and *Lakshminarayana* v. *Punnayya*, A.I.R. 1927 Mad. 820, referred to.

Jambulinga Pathan v. *Akilanda Asari*, A.I.R. 1927 Mad. 886, distinguished.

Appeal against the decree of the District Court of Madura in A.S. No. 195 of 1932 preferred against the decree of the Court of the District Munsif of Madura Town in O.S. No. 532 of 1926.

K. Rajah Aiyar for Appellant.

K. S. Venkataramani for Respondents.

The Court delivered the following

JUDGMENT.—The appellant claims to be the newly appointed trustee of the Gurunathaswami temple and the suit was instituted by him for recovery of the movable properties of the temple including cash after taking an account of the trust

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* S. A. No. 303 of 1934. 11th April, 1938.

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money received by the respondent the previous trustee who is stated to have been lawfully removed by the members of the community. The respondent pleaded that the suit was bad for want of sanction under S. 92 of the Civil Procedure Code and the plea was upheld by the Courts below.

The question for determination is whether sanction under S. 92 of the Civil Procedure Code is necessary and as pointed out in a similar case in *Venku Chettiar* v. *Doraisami Chettiar*[1], which was followed by the Full Bench in *Appanna Poricha* v. *Narasinga Poricha*[2], S. 92 of the Civil Procedure Code governs only suits for the vindication of the rights of the public in public, charitable or religious trusts and not to suits by a trustee for vindicating his right of management and getting possession of the trust properties. A suit by a trustee against another whom he alleges to have been lawfully removed is outside the scope of the section even though it asks for an account of the trust money received and to the same effect is the decision in *Lakshminarayana* v. *Punnayya*[3]. Sanction was necessary in the case in *Jambulinga Pathan* v. *Akilanda Asari*[4], as the suit was instituted on behalf of the public, and the dismissal of the suit in this case for want of sanction under S. 92 of the Civil Procedure Code is unsustainable. The decree of the Courts below are therefore set aside and the suit is remanded to the trial Court for disposal according to law. Court-fee paid on the memorandum of appeal in the lower appellate Court and here, will be refunded and costs up to date will abide and follow the result.

Leave is refused.

B.V.V. —— *Case remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE LAKSHMANA RAO.

Duraisami Raju .. *Petitioner* (1st Accused).*

Duraisami Raju, *In re.*

Motor Vehicles Rules of 1938, rr. 175 and 176—Driver of bus—Liability for overloading.

The driver of a motor bus is not mentioned under rr. 175 and 176 of the Motor Vehicles Rules of 1938 and cannot be made liable for the offence of

1. (1921) 14 L.W. 38.
2. (1921) 41 M.L.J. 608: I.L.R. 45 Mad. 113 (F.B.).
3. A.I.R. 1927 Mad. 820.
4. A.I.R. 1927 Mad. 886.

* Crl. R.C. No. 835 of 1938 and Crl. R. P. No. 793 of 1938. 9th February, 1939.

overloading and for violating the condition of the 'G' permit issued under the previous Motor Vehicles Rules of 1923, regarding the maximum number of passengers that can be carried in a bus. Duraisami Raju, *In re.*

Petition under Ss. 439 and 561-A of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Second Class Magistrate of Tiruvadamarudur dated 1st October, 1938, in C.C. No. 291 of 1938 and to quash all proceedings in the said C.C. No. 291 of 1938.

A. S. Sivakaminathan for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Court made the following

ORDER.—The petitioner is a motor bus driver and he is alleged to have violated the condition of the 'G' permit issued under the Motor Vehicles Rules of 1923 regarding the maximum number of passengers that can be carried in the bus. The violation of the condition was made punishable by r. 30(*a*) (1) of the Madras Motor Vehicles Rules of 1923 which have been superseded by the Motor Vehicles Rules of 1938 and the driver is not mentioned in rr. 175 and 176 of the new rules which deal with issue of tickets and overloading. There is no rule in the Motor Vehicles Rules of 1938 corresponding to r. 30 (*a*) (1) of the Rules of 1923 making the driver liable for the offence of overloading and r. 262 is only a saving clause which validates the 'G' permit issued under the old rules till its expiry. It cannot possibly be construed as a penal provision and the charge against the petitioner is unsustainable.

The revision petition is therefore allowed and the proceedings against the petitioner are quashed.

K.C. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ABDUR RAHMAN.

Sivakami Achi .. *Appellant** (*Petitioner—2nd Defendant*)

v.

Narayana Chettiar .. *Respondent* (*Respondent—Plaintiff*).

Civil Procedure Code (V of 1908), O. 39, r. 1 (a)—Application by defendant—Competency. Sivakam Achi *v.* Narayana Chettiar.

An application under O. 39, r. 1 (*a*) of the Civil Procedure Code can be made on behalf of a defendant who is entitled to come to the Court if any such act as is referred to in the rule is committed by the plaintiff.

* A. A.O. No. 214 of 1938. 24th January, 1939.

Sivakami Achi *v.* Narayana Chettiar.

Appeal against the order of the Court of the Subordinate Judge (Principal) of Devakottah dated the 17th January, 1938, and passed in I.A. No. 14 of 1938 in O.S. No. 49 of 1936.

G. N. Chari for Appellant.

M. Patanjali Sastri for Respondent.

The Court delivered the following

JUDGMENT.—The ground on which the application was turned down by the lower Court that an application under O. 39, r. 1 (*a*) of the Code of Civil Procedure could not be made on behalf of a defendant is erroneous. If the learned Subordinate Judge had taken the trouble of reading O. 39, r. 1 (*a*) of the Code of Civil Procedure, he would have come to a different conclusion. I would now draw his attention to the words 'by any party' used in the section. They would include the plaintiff and if any such act is committed by the plaintiff it is only the defendant who would have come to the Court with a complaint. Again the ruling in *Karori Chand* v. *Maharaj Bahadur Singh*[1], does not support the proposition for which it has been quoted. If the lower Court had bestowed a little more attention to the ruling and not to the words used in the head notes this appeal would not have been necessary.

The order passed by the lower Court must be set aside and the application would now be disposed of by the lower Court in accordance with law. The costs in this Court will abide the result of the petition in the lower Court.

K.C. ——— *Order set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO.

P. S. Venkataraman .. *Appellant* (Plaintiff)*

v.

Srimathi A. C. Janaki .. *Respondent (Defendant).*

Venkataraman *v.* Janaki.

Personal Law—Renunciation of—If can be by modes other than those recognised by law (migration or change of religion)—Marumakkathayam—If a Nair can renounce by mere declaration.

In a suit for restitution of conjugal rights the defendant, a Nair female governed by the Marumakkathayam Law as modified by the Madras Marumakkathayam Act, pleaded that under S. 5, cl. *2* of the Madras Marumakkathayam Act the plaintiff was legally incompetent to marry her on account of

1. (1916) 1 Pat. L. J. 560.

* C. C. C. A. No. 43 of 1936. 11th January, 1939.

the continuance of his prior marriage with another. The plaintiff contended that at the time of the marriage the defendant relinquished her personal law. On the issue whether the defendant could validly give up the advantage and protection given to her under the Marumakkathayam Act, Venkataraman v. Janaki.

Held, the personal law by which a person is governed can only be renounced or changed in one of the modes recognised by law. One such is a change of religion; the other is by migration from one province to another so far as India is concerned or by going and settling in another country. It is not open to a person to renounce by a mere declaration the personal law to which he is subject and to get rid of the statutory prohibition which is enacted not for the benefit of a particular individual but as a rule of public policy affecting the whole community.

Appeal against the decree of the Court of the City Civil Judge (Principal), Madras, dated 28th August, 1936, in O.S. No. 312 of 1936.

K. Rajah Aiyar and *G. N. Tirumalachari* for Appellant.

O. T. G. Nambiar for Respondent.

The Court delivered the following

JUDGMENT.—This appeal raises a question of some importance regarding the validity of an alleged marriage between the plaintiff and the defendant. The plaintiff is a Brahmin by birth and follows the Hindu religion. The defendant is a Nair lady belonging to a respectable Nair tarwad of Malabar. In December, 1934, the plaintiff was the Managing Director of a film company known as the South Indian Film Corporation which has since gone into liquidation. The defendant was employed in the said corporation. It is alleged in the plaint that on the 21st December, 1934, the plaintiff and the defendant went through a form of marriage according to Hindu rites and ceremonies at a village called Tiruneermalai, a few miles distant from Madras and from that day up to 4th April, 1935, lived together as husband and wife. It is further alleged that the defendant left for her place thereafter and refused to return and live with the plaintiff. Hence the plaintiff instituted the suit, out of which this appeal arises, for restitution of conjugal rights. The defendant denies the factum of the marriage and her living with the plaintiff. According to her she went on a month's leave in April to her place and resigned the post she held in the Film Company. Even assuming the marriage to be true, she denied the validity of the marriage and questioned the jurisdiction of the Court to entertain the suit. Her pleas in regard thereto are thus outlined in paragraphs 3 and 14 of her

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written statement:

"3. The defendant is a Hindu, permanently resident in the Kadirur Village, Kottayam Taluk, North Malabar, governed by the Marumakkathayam Law of Inheritance and states that under S. 11 of the Madras Marumakkathayam Act, the present suit is not maintainable and that it should be dismissed *in limine*.

"14. On the 21st December, 1934, the date on which the plaintiff alleges in the plaint to have married the defendant and even long prior thereto, the plaintiff has been a married man having married in his own community and the said marriage was subsisting on the said date. The defendant states that under S. 5 of the Madras Marumakkathayam Act, the plaintiff was legally incompetent on account of the continuance of his prior marriage to marry the defendant on the said date and any such marriage is void."

It is admitted that the plaintiff was a married man and had a wife living on the date of the marriage. Among the issues raised were the following:—

"1. Was the defendant a Marumakkathayee on the date of the alleged marriage?

2. Is the suit not sustainable for the reasons set out in paragraph 3 of the written statement?

5. Is the plaintiff not legally competent to marry the defendant as stated in paragraph 14 of the written statement?"

An application was taken by the defendant on the 30th July, 1936, for trying issues 1 and 2 as preliminary issues. The plaintiff filed a counter-affidavit opposing the application wherein he deposed as follows:—

"Further, as stated in the plaint, the petitioner has openly and willingly married me with all the religious ceremonies according to the Hindu Shastras. She did not want to take advantage of the protection given to her under the Act. She was fully aware before and at the time of my marriage with her that I had already a wife. She has even expressed to others that she was marrying me in spite of her rights under the above Act which she was saying she was giving up to marry me. I have got respectable witnesses to prove all these facts."

The plaintiff amplified this plea at the time when the application was heard thus:

"Plaintiff states that there has been a marriage, that even in spite of the Marumakkathayam Act, the marriage is valid, that the defendant is not governed by Marumakkathayam law, that at the time of marriage, relinquished that law of inheritance and succession, and that even if she has not relinquished, the marriage is valid" *Vide* the order dated 4th August, 1936.

On the pleadings and on the oral submission of the parties the learned City Civil Judge framed the following preliminary issue:

"Whether the defendant could validly give up the advantage and protection given to her under the Act and whether on that account the defendant

was not a Marumakkathayee when she married the plaintiff and whether on that account the marriage is valid."

The learned City Civil Judge heard arguments on the said issue without taking evidence, answered it in favour of the defendant and dismissed the suit. The plaintiff has filed this appeal.

The question for decision is whether the defendant was a Marumakkathayee on the date of her alleged marriage with the plaintiff, that is, the 21st December, 1934, and whether the said marriage is valid. The defendant was a Nair female governed by Marumakkathayam law except in so far as it is modified by the statute. The Marumakkathayam law is the customary law followed and observed by the Nairs of Malabar. For the decision of the question in issue it is unnecessary to consider whether the Marumakkathayam law is only a school of Hindu law or a purely customary law which can in no sense be a branch or school of Hindu law. It cannot be denied that Nairs are Hindus and in the religious and social life they are governed by the same shastras that govern the rest of the Hindus, who inhabit the presidency of Madras of which Malabar is a part. The Marumakkathayam law, whether it is a school of Hindu law or a customary law, is a law which is prevailing in the Madras Presidency followed and observed by a certain section of the Hindus. As observed by Mayne in his book on Hindu Law, 10th Edition, at page 97:

"In India there is no *lex loci*, every person being governed by the law of his personal status."

Again, in another portion the learned author observes thus:

"*Prima facie* any Hindu residing in a particular province in India is held subject to the particular doctrines of Hindu Law and recognised in that province" (page 95).

I would qualify the statement of the law thus: "The particular school of Hindu law or the customary law applicable to the class to which the said Hindu belongs and recognised in that province."

As the learned author again observes at page 96:

"This law is not merely a local law It becomes the personal law and a part of the status of every family law which is governed by it."

Therefore in every case where the question arises what is the law by which a person is governed, regard should be had to the law of the class or family to which he belonged. Of course, if he did not belong to any particular class or family it

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would be the general doctrines of Hindu law prevalent in that province wherein he resided. Once it is determined what the personal law of a person is, it will continue to be of obligatory force on him. Venkatasubba Rao, J., in *Morarji* v. *Administrator-General of Madras*[1] remarks thus:

> "While ordinarily a British Indian subject can change his domicile and acquire a new law along with a new domicile, this right is denied to a Hindu. It must be borne in mind that I am now dealing with the law to be administered by a British Indian Court. Under that system of law, a Hindu carries along with him his personal law wherever he goes and he cannot, however fixed his determination may be, get rid of that law. Is the person a Hindu? Then, wherever the law of British India admits the operation of a personal law, his rights and obligations are determined by the Hindu Law, that is, the law of his religion, subject to the exception that by statute any part of that law may be abrogated."

Thus once it is known that a person is a Nair and belongs to a Malabar tarwad, it follows that the personal law by which he is governed is the Marumakkathayam law of Malabar except in so far as that law has been modified or altered by statute. In this case the law that will be applicable to the defendant will be the Marumakkathayam law as modified by the Madras Marumakkathayam Act of 1932. Under that Act a Marumakkathayee is defined as "a person governed by the Marumakkathayam Law of Inheritance" and Marumakkathayam is defined as "the system of inheritance in which descent is traced in the female line but does not include the system of inheritance known as the Aliyasantana." It is not denied that the defendant was a Marumakkathayee within the meaning of the Act before the date of the marriage. If she was a Marumakkathayee, under S. 5, cl. 2, any marriage contracted by a male with a Marumakkathayee female during the continuance of a prior marriage of such male, shall be void, notwithstanding that his personal law permits of polygamy. Thus, if on the date of the marriage the defendant was a Marumakkathayee, there can be no doubt that her marriage with the plaintiff is void and this is conceded by Mr. Rajah Aiyar on behalf of the plaintiff. But it is contended that the defendant renounced the Marumakkathayam law and ceased to be a Marumakkathayee and therefore the marriage must be deemed to be valid, there being no statutory prohibition precluding it. The question is, is this contention tenable? The contention of Mr. Rajah Aiyar is that

1. (1928) 55 M.L.J. 478 : I.L.R. 52 Mad. 160 at 172.

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a person by a mere declaration can renounce the personal law by which he is governed. Mr. Rajah Aiyar was not able to cite any direct authority on the point nor Mr. O.T.G. Nambiar who appeared for the defendant. It is a well-established principle of law that no person can alter the devolution of his estate by his own will. The same principle would also apply to the laws of the family or what may be called the law relating to personal status. In effect, the personal law by which a person is governed can only be renounced or changed in one of the modes recognised by law. One such is a change of religion; the other is by migration from one province to another so far as India is concerned or by going and settling oneself in another country. Excepting by those modes it is not open to a person to renounce by a mere declaration the personal law to which he is subject. Mayne in his book on Hindu Law observes thus:

"A man cannot alter the law applicable to himself by a mere declaration that he is not a Hindu. He can only alter his existing status by becoming a member of such a religion as would destroy that status and give him a new one."

This principle is stated in very clear terms by West, J., in *Kahandas Narrandas*, In re[1]:—

"In the introduction to his law of obligations Savigny specifies the laws of the family and of succession as those allowing the least scope to free action, and in his system he says expressly that these laws are not modifiable by the disposition of any person. This is indeed the main principle of the Tagore case. The *dicta* of the Judicial Committee as to the voluntary character of customs in *Abraham* v. *Abraham*[2] imply a multiplicity of persons as well as of acts, and though they allow a man to transfer himself from the class to which he has hitherto belonged to another class, do not in either class permit him to make a law for himself different from that which governs his fellows. Such a permission would, in fact, be inconsistent with any rational notion of a law."

Therefore the personal law in all matters will continue to govern him. He cannot get rid of it however fixed his determination is, as observed by Venkatasubba Rao, J. It must only be done in a mode recognised by law.

Mr. Rajah Aiyar has placed considerable reliance on a number of cases and I propose to deal only with some of them. He relied on *Nathu* v. *Keshawji*[3] and the decision of the Privy Council in *Abraham* v. *Abraham*[2] for the position that it is

1. (1881) I.L.R. 5 Bom. 154 at 164.
2. (1863) 9 M.I.A. 195.
3. (1901) I.L.R. 26 Bom. 174

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competent for one to leave his caste and enter some other caste and be governed by the rules and regulations of the latter and therefore it would be open to the defendant to leave the Nair community to which she belonged and enter into a marriage with the plaintiff. The fallacy in this argument is that the defendant was not leaving any community to which she belonged and entering into any other community. It cannot be asserted with any degree of reason that the defendant can become a Brahmin by marrying the plaintiff and enter into the community to which the plaintiff belonged. All that is alleged in this case is that by declaration she renounced the benefit of the Act by going through the form of marriage alleged by the plaintiff. If it is not open to a Hindu who is governed by a personal law of his own to renounce it by an open declaration that he will cease to be governed by it, it is not possible to see how the principle enunciated in *Nathu* v. *Keshawji*[1] and other cases as to the power of a caste to admit a stranger into its fold not born within it, nor the power of a person to change from one class into another, will apply to this case. As pointed out by West, J., in the passage cited by me, to invoke the principle of those decisions a person must transfer himself from the class to which he has hitherto belonged to another class (vide also *Abraham* v. *Abraham*[2]) but it does not permit a man to abjure his class and make a law for himself. The decision of the Privy Council in *Abraham* v. *Abraham*[2], on which some reliance was placed is a very distinct authority for the position that by conversion a man can renounce the law by which he is governed and continue to elect to abide by the old law or the law of the religion which he has adopted in cases where there is no statutory prohibition, but until he does so, the old law will govern. The case is also an authority for the position that if there was no change of religion, the personal law would have a continuing obligatory force upon him. Mr. Rajah Aiyar placed considerable reliance on the following passages in the judgment of Sankaran Nair, J., in *Muthusami Mudaliar* v. *Masilamani*[3]:

"It is open to a Hindu who is governed by one law of inheritance to accept another law of inheritance recognised by Hindu Law."

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1. (1901) I L R. 26 Bom. 174.
2. (1863) 9 M.I.A. 195 at 244, 245.
3. (1909) 20 M.L.J. 49 : I.L.R. 33 Mad. 342 at 348.

But it will be seen that the learned Judge explains what he means in the very next sentence thus:

"Thus it has been held that a Hindu governed by the Mitakshara law may retain it or accept the Dayabaga law prevalent in the locality to which he had migrated,"

that is, where a person migrates from one part of India to another, *prima facie*, he would carry his personal law, but it will also be open to him to renounce that law and be governed by the law prevailing in the locality to which he has migrated, and this must be affirmatively proved. Till then the personal law by which he was governed before migration will continue to have obligatory force on him. (Vide *Abdurahim Haji Ismail Mithu* v. *Halimabai*1). Sankaran Nair, J., did not lay down that a person by an open declaration can renounce the law without a change of religion or migration from one part of territory to another. The principle has been carried to such an extent that even in a case where portion of a province has been annexed to another province for administrative purposes this transfer would not affect the personal law of residents remaining in the portion transferred and it must be distinctly shown that a person had intended to change and in fact changed his personal law. It is not suggested that a person coming from Malabar and taking service in Madras could be said to have migrated from one part of India to another or settled himself in a foreign country; nor has it been asserted that there has been any change of religion on the part of the lady. On the pleadings the only fact that appears is an oral renunciation implied from the fact of her going through a marriage as alleged by the plaintiff. What is alleged would amount to a clear evasion of the Marumakkathayam Act and it is not open to a private individual to get rid of the statutory prohibition which is enacted nor for the benefit of a particular individual but as a rule of public policy affecting the whole community by a mere declaration that he or she did not intend to be governed by the Act. It seems to me therefore that the decision arrived at by the learned City Civil Judge that the marriage is invalid is sound. In the result the appeal fails and is dismissed with costs.

K.S. —— *Appeal dismissed.*

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1. (1915) 30 M.L.J. 227 at 230: L.R. 43 I.A. 35 (P.C.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VARADACHARIAR AND MR. JUSTICE ABDUR RAHMAN.

Mottai Meera *alias* Sheik Abdul Kadir Rowther .. *Petitioner** (*Appellant in Appeal No. 246 of 1934 on the file of the High Court*)

v.

Chinna Sheik Abdul Kadir Rowther and others .. *Respondents* (*Respondents in do.*).

Mottai Meera *v.* Chinna Sheik Abdul Kadir Rowther.

Madras Agriculturists' Relief Act (IV of 1938), S. 4, cl. (f) and S. 9—Liability under a decree of one co-owner found to have held and managed the properties on behalf of all the co-owners to pay over the interest realised by him—S. 4, cl (f)—Applicability—Interest subsequent to decree—If governed by S. 9 of Act IV of 1938.

In a suit for partition in a Mahomedan family a decree for the respective shares of the parties was passed against the first defendant who was found to have held and managed the property on behalf of all the co-owners. With respect to the outstandings and the income during the first defendant's management, as it was found that all the monies were being invested mostly bearing interest at 12 per cent. per annum it was held the first defendant was liable to pay the plaintiff and defendants 2 and 3 the amounts collected on their account by the first defendant and Rs. 8,700 for interest thereon. Further interest on the aggregate amount at 6 per cent. per annum from date of suit was also decreed. On an application for relief under Madras Act IV of 1938,

Held, the original liability to pay over the interest realised by one co-owner to the other co-owners entitled to it, is taken out of the operation of the Madras Act IV of 1938 by cl. (*f*) of S. 4 of that Act.

Peer Mohideen Rowther v. *Aisa Bivi*, (1934) 67 M.L J. 563, referred to.

The liability to pay interest subsequent to the date of decree, is governed by S. 9 of Act IV of 1938. "Incurred" in the opening sentence of S. 9 refers not only to a liability voluntarily incurred but even to liabilities arising under law, custom or decree of Court.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to amend the decree of the High Court dated 26th August, 1938, in Appeal No. 246 of 1934 (O. S. No. 16 of 1930, Sub-Court, Madura) as regards interest, in accordance with the provisions of the Madras Agriculturists' Relief Act, 1938.

B. Sitarama Rao for *R. Ramasubba Aiyar* for Petitioner.

V. Ramaswami Aiyar for *K. Rajah Aiyar* and *N. G. Krishna Aiyangar* for Respondents.

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* C.M.P. No. 2932 of 1938. 25th November, 1938.

Mottai Meera v. Chinna Sheik Abdul Kadir Rowther.

Varadachariar, J.

The Court made the following

ORDER. *Varadachariar, J.*—This is an application for relief under Madras Act IV of 1938, filed by the first defendant in a suit for partition in a Mahomedan family.

It was found in the main case that the first defendant who was the eldest child of his father and a major at the time of the father's death entered into possession and management of the father's property at his death and that as he had a minor brother and a minor step-brother and step-sister he was found to have held and managed the property on behalf of all the co-owners. In 1925 there were disputes in the family and the first defendant left the family house and lived elsewhere. It was also found that during his period of management, the first defendant had collected outstandings due to the father's estate and the income due from the common property of the family. In 1929 the plaintiff who is the first defendant's step-brother instituted a suit for division and recovery of his 2/7th share. A decree was given in plaintiff's favour and also in favour of defendants 2 and 3 for their respective shares. With respect to the outstandings and the income realised by the first defendant during the period of his management the lower Court found that the other co-sharers were entitled to claim payment of interest thereon as it had been shown that the first defendant had been investing all the monies in his hands and that many of the promissory notes taken by him bore interest at 12 per cent. per annum. The lower Court accordingly held that the first defendant was liable to pay to the plaintiff and to defendants 2 and 3 a sum of Rs. 14,480 representing amounts collected by him on their account and Rs. 8,700 for interest thereon. It also directed payment of interest on the aggregate amount at 6 per cent. per annum from the date of the institution of the suit to the date of payment.

On appeal to this Court, we allowed certain deductions claimed by the first defendant in his favour. In other respects we confirmed the decree of the lower Court. The first defendant's liability to pay interest was challenged before us but we affirmed the lower Court's decision on this point. It is with reference to this liability for payment of interest that the present application for relief under Madras Act IV of 1938 has been filed.

Mottai Meera v. Chinna Sheik Abdul Kadir Rowther.

Varadachariar, J.

We are of opinion that the main liability is not covered by Act IV of 1938 as it is not a "debt" within the meaning of the Act. Our judgment itself and the cases dealing with the point proceed on the footing that ordinarily the relation between co-owners, when one of them is in possession of common funds, is not that of creditor and debtor but that the liability to pay interest will arise in cases in which it is shown that the person in possession of the common funds has realised interest by their investment. In this class of cases the liability to pay interest seems to us to rest on one of two bases: (1) that each co-owner is entitled to claim a share in the common property *as it stands at the time of the division* and that in the case supposed the common property liable to be divided consists not only of the original realisations but of the interest earned by their investment as well. If this be the true basis, we see no justification for denying the co-sharer his share in the full extent of the property which on this theory will consist of the original amount plus its accretion. Another possible view is that the co-owner who has realised interest by the investment of the common funds is governed by S. 90 of the Trusts Act and that by virtue of S. 95 of that Act he incurs a liability to pay interest under S. 23 of that Act. This is the view taken by Venkatasubba Rao, J., in *Peer Mohideen Rowther* v. *Aisa Bivi*[1]. If this be the true basis, the case will be taken out of the operation of the Madras Act IV of 1938 by clause (*f*) of S. 4 of that Act. We are not prepared to accede to the contention that S. 4, cl. (*f*) ought not to be held to apply to obligations declared in Chapter IX of the Trusts Act.

So far however as the liability to pay interest *subsequent* to the date of lower Court's decree is concerned, we think there is some justification for the petitioner's contention that that is governed by S. 9 of Act IV of 1938. This is a liability imposed upon him by the decree and does not rest on the same basis as the original liability to pay over the interest realised by him. The word 'incurred' in the opening sentence of S. 9 no doubt suggests the idea of a liability voluntarily incurred but the terms of cl. 1 of that section seem to indicate that the section refers not only to contractual liability but even to liabilities arising under law, custom or decree of Court. In this view the decree of the lower Court must be varied by limiting the award

1. (1934) 67 M.L.J. 563.

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of 6 per cent. interest up to the date of the lower Court's decree and providing for payment of interest at 5 per cent. per annum from 31st March, 1934, up to date of payment.

K.S. —— *Petition allowed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE SOMAYYA.

Kamakshi Aiyar *alias* W. V. A. S. Kameswara Aiyar (dead) and another .. *Appellants** *(Plaintiff and L.R.)*

v.

Namberumal Aiyangar *alias* Ranganatha Aiyangar and another .. *Respondents (Defendants).*

Kamakshi Aiyar v. Namberumal Aiyangar.

Court-Fees Act (VII of 1870), S. 7 (v) and Sch. II, Art. 17-B—Prior mortgagee becomes purchaser of portion of property—Subsequent mortgagee becoming purchaser of the entire property subject to the early mortgage—Prior mortgagee obtaining symbolical possession—Suit for partition against subsequent mortgagee remaining in actual possession—Proper court-fees.

A obtained a mortgage decree in respect of the western portion of a house and at the subsequent sale in execution became the purchaser thereof. *B* who held a second mortgage over the whole house obtained a mortgage decree in respect of the whole house and in execution thereof became the purchaser, subject to *A's* right. *A* was put in symbolical possession of his half portion of the property. *B* who was in physical possession of the whole of the property, refused to allow *A* to enter into physical possession of his portion. A suit was brought by *A* for partition of the property and possession of his half share, and also for mesne profits.

Held, that the plaint should be stamped under S 7 (*v*) and not Art. 17-B of Sch. II of the Court-Fees Act.

The suit was in truth and in fact a suit for possession against a person in wrongful possession of the property.

Appeal against the decree of the Court of the Subordinate Judge of Ramnad at Madura, in A.S. No. 78 of 1931 preferred against the decree of the Court of the District Munsif of Srivilliputhur in O.S. No. 255 of 1927.

K. Balasubramania Aiyar for *Watrap S. Subramania Aiyar* for Appellants.

R. Gopalaswami Aiyangar for *K. S. Champakesa Aiyangar* for 1st Respondent.

T. Krishna Rao for *The Government Pleader* on behalf of the Government.

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* S.A. No. 430 of 1934. 2nd February, 1939.

Kamakshi Aiyar v. Namberumal Aiyangar.

Leach, C.J.

The Court made the following

ORDER. *The Chief Justice.*—In O.S. No. 409 of 1905 of the Court of the District Munsif of Srivilliputhur the appellant obtained a mortgage decree in respect of the western portion of a house and at the subsequent sale in execution became the purchaser thereof. The respondent in the appeal held a second mortgage over the whole house. On the 8th March, 1924, the appellant obtained symbolical possession of the western half. In 1914, the respondent obtained a mortgage decree in respect of the whole house, and in execution thereof caused it to be sold. He was himself the purchaser, but his purchase was, of course, subject to the appellant's right and therefore was only effective with regard to the eastern half. The respondent was in physical possession of the whole of the property throughout and in spite of the fact that the appellant had been put in symbolical possession of his half of the property refused to allow him to enter into physical possession of his portion. The result was that the appellant brought suit No. 255 of 1927 in the Court of the District Munsif for partition of the property and possession of his half share. In his plaint he averred that the respondent was in wrongful possession and enjoyment of the whole house. Notwithstanding the nature of the suit the appellant stamped his plaint with a stamp of the value of Rs. 15 under Art. 17-B of the Court-Fees Act, as amended by the Madras Act V of 1922. Art. 17-B is a residuary article. It states that the fee on a plaint or memorandum of appeal where it is not possible to estimate at a money value the subject-matter in dispute and which is not otherwise provided for by the Act shall be Rs. 15 in a suit in a District Munsif's Court. The respondent raised the question of the stamping of the plaint contending that the suit should have been valued according to the market value of the house under the provisions of S. 7 (*v*) of the Act. The District Munsif decided the question in favour of the appellant and decreed the suit. The respondent appealed to the Subordinate Judge who by an order dated the 8th December, 1931, held that the District Munsif was wrong and should have required the suit to have been stamped *ad valorem* on Rs. 2,500, the market value of the house.

On this valuation the proper court-fee was Rs. 224-15-0. The memorandum of appeal had only been stamped to the value of Rs. 15 and therefore there was a deficiency of Rs. 209-15-0.

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The Subordinate Judge gave the respondent a week's time in which to pay this deficiency and as he failed to comply with the order dismissed the appeal. The Subordinate Judge also took up the question of the stamping of the plaint and held that the District Munsif should have required the plaintiff to pay an *ad valorem* fee of Rs. 224-15-0. The Subordinate Judge called upon the appellant to pay the deficiency and gave him three days' time to comply with the order. As the appellant failed to comply, the Subordinate Judge dismissed the suit under the provisions of S. 12 (*ii*) read with S. 10 (*ii*) of the Court-Fees Act. The present appeal is against that order.

The appeal first came before Venkataramana Row, J., who considered that it raised a question of some importance and consequently it has been placed before a Bench. We have no doubt that the Subordinate Judge was right in holding that the plaint should have been stamped under the provisions of S. 7 (*v*). The suit was in truth and in fact a suit for possession against a person in wrongful possession of the property. Not only was possession sought, but a decree for mesne profits was also asked for by the appellant, who expressly averred in his plaint that his claim to be put in possession of his half of the house had been wrongfully refused. The appellant was in possession of no portion of the property. In these circumstances S. 7 (*v*) of the Act applied, and not Art. 17-B.

The learned advocate for the appellant has asked us to give him a further opportunity of paying the deficiency in the stamping of the plaint. The learned advocate for the respondent has made a similar request with regard to his appeal to the Subordinate Judge. He asks that he may be given an opportunity of paying the deficiency and having his appeal heard on the merits. We consider that justice will be done if we accede to both these requests. The appellant will be given a fortnight's time in which to pay the court-fee of Rs. 209-15-0 being the difference between the proper court-fee of Rs. 224-15-0 and Rs. 15 which was actually paid on the plaint. If the amount is paid within the time the respondent will be given a further three days in which to pay the deficiency on his memorandum of appeal, namely, Rs. 209-15-0. If he does so, his appeal will be restored to the list and heard on its merits. The appellant has stamped his appeal to this Court with a fee of Rs. 15. The proper court-fee should have been Rs. 23-9-0.

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There is therefore here a deficiency of Rs. 8-9-0. The learned advocate for the appellant has undertaken to pay this amount. This must be paid within one week. Failure to pay this amount within the time will mean that the second appeal will stand dismissed. Each party will pay his own costs.

K.C. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN.

Synemodelux Limited at Tinnevelly Junction by its Managing Director M. P. Nayagam .. *Petitioner** (*Plaintiff*)

v.

K. Vannamuthu Pillai .. *Respondent* (*Defendant*).

Synemodelux Limited v. Vannamuthu Pillai.

Companies Act (VII of 1913), Ss. 28 (2) and 30 (1)—Person subscribing for shares in the memorandum of association—No allotment of shares—Liability for value of shares.

Where a person subscribed for 20 shares in the memorandum of association and the prospectus contained a statement that a certain number of shares were subscribed by the signatories to the memorandum and were allotted and there was no resolution in the minutes book of directors allotting shares to the persons concerned,

Held, that as there was no valid allotment of shares, no liability to pay the value of the shares arose.

Petition under S. 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the Subordinate Judge of Tinnevelly dated the 1st day of December, 1937 and passed in Small Cause Suit No. 151 of 1937.

V. T. Rangaswami Aiyangar and *K. Venkatesvaran* for Petitioner.

R. S. Srinivasacharya and *K. V. Rajagopalan* for Respondent.

The Court delivered the following

JUDGMENT.—In my opinion the dismissal of the suit by the learned Subordinate Judge was correct. The defendant subscribed for 20 shares in the memorandum of association and therefore by S. 30, sub-S. (1) of the Companies Act, he must be deemed to have agreed to become a member of the company, and on registration of the company, his name must be entered as a member in the register of members. The fatal defect, in

* C. R. P. No. 180 of 1938. 6th January, 1939.

my opinion, in the plaintiff's case is that the 20 shares for which the defendant subscribed were not validly allotted to him. It is no doubt true, as Mr. Rangaswami Aiyangar for the petitioner contends, that in the case of a person who subscribes to the memorandum of association, no separate application for shares is necessary, but I find nowhere any authority for the view that no express *allotment* of shares is necessary in order to give rise to a liability to pay up the value of the shares. The learned Advocate for the petitioner refers me to Resolution No. 9 passed on the 21st of December, 1936. That runs as follows:—

"This meeting allots hereby the 517 shares subscribed for by the signatories and the names of the signatories may be entered in the register of members."

Mr. Rangaswami Aiyangar also refers to the prospectus which was published later in which there is a statement on page 1 that 517 shares to the value of Rs. 12,925 have already been subscribed for by the signatories to the memorandum and allotted, and on pages 6 and 7 of the prospectus, the number of shares taken by each of the signatories to the memorandum is set out. These however are not sufficient to show that on the 21st of December, 1936, there was any 'allotment' of shares to the defendant. It is provided in S. 28, sub-S. (2) of the Companies Act that each share in a company having a share capital shall be distinguished by its appropriate number and by S. 31, sub-S. (1), every company is required to keep a register of members in which the following particulars are to be entered:—

(1) the names and addresses and the occupations, if any, of the members, in the case of a company having a share capital, a statement of the shares held by each member, distinguishing each by its number, and of the amount paid or agreed to be considered as paid on the shares of each member.

Now, it appears from the notice sent to the defendant by the plaintiff on the 8th of March, 1937, informing him that his shares had been forfeited that the shares of which he was registered as owner were shares numbered from 121 to 140. But the learned Counsel for the petitioner is not able to show me any resolution in the Minutes Book of the Board of Directors allotting shares numbered 121 to 140 to the defendant. I have looked through the book and there is no record of any such resolution. It is not necessary, in my opinion, to go so far as the learned Subordinate Judge has gone and to say that the

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defendant's liability to pay for the shares cannot arise till liquidation proceedings are started. But it is, in my opinion, clear that his liability has not yet arisen because the shares have not been validly allotted to him and consequently no valid notice of allotment has been given to him. It is not necessary to consider the allegation that the defendant's shares have been forfeited. I do not understand the plaintiff as having contended that the defendant's liability to pay the value of the shares arises on forfeiture.

The dismissal of the suit was, in my opinion, correct and therefore this petition is dismissed with costs.

K. C. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VARADACHARIAR AND MR. JUSTICE PANDRANG ROW.

A. Subramania Aiyar .. *Appellant* (2nd Defendant)*

v.

K. S. Venkatarama Aiyar and others .. *Respondents (Plaintiffs and Defendants 1 and 3 and Nil).*

Subramania Aiyar *v.* Venkatarama Aiyar.

Madras Estates Land Act (I of 1908), S. 172—Construction—Chapter XI—Scheme of—Powers of Board of Revenue—Interference before republication of settlement record—Fixation of cash rent in village in which rent in kind had been in vogue previously in settlement proceedings—Jurisdiction of Board of Revenue—Procedure for fixing cash rent—Mere conversion of paddy rate fixed by Board into money on basis of average price of last ten years—Legality of—Chapter XI—If confined to fixing of rent on cash basis only.

S. 172 of the Madras Estates Land Act should not be interpreted as giving powers of revision to the Board of Revenue only after the republication of the Settlement Record after confirmation by the Collector under S. 170 (3) of the Act. All that S. 172 does is to fix the outer limit of time within which the powers of revision may be exercised. This does not necessarily imply that the Board has no power of interference before the republication. There is no warrant either in the language of the section or in the reason of the thing to justify the view that the Board has no jurisdiction to exercise its revisional powers till after the settlement record has been republished after confirmation by the Collector.

There is nothing in the scheme of Chapter XI of the Madras Estates Land Act to restrict the authorities settling the rent to the system of payment theretofore in vogue. There may be cases in which the settlement of a fair and equitable rent can be better accomplished by fixing a rent in money. What could be done under Ss. 30, 38 and 40 of the Act can also be done as

* Appeal No. 289 of 1934. 22nd March, 1938.

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part of the settlement proceedings. It cannot therefore be held that in proceedings under Chapter XI the Board has no power to fix a money rent in respect of a village where only rent in kind had hitherto been in vogue.

S. 172 contemplates the Board of Revenue directing a revision by the Subordinate authority and not the fixing of rent by the Board itself. In certain circumstances, however, a procedure which goes further than merely directing a revision by a subordinate authority might not amount to anything more than an irregularity; for example, where it is a mere arithmetical calculation or something of that kind, which is not in excess of jurisdiction in the exercise of the powers of revision under S. 172. If, on the other hand, the Board proceeds to do something which is really more than a mere ministerial or arithmetical step, which, if it had been directed by the Revenue Officer, would involve a consideration of a number of matters which are not and cannot be before the Board at the time when it passes the order, it must be held that so much of the Board's order as goes beyond what is contemplated by S. 172 is done without jurisdiction.

Where, at an early stage in the proceedings before the Revenue Divisional Officer, the landlord opposed the proposal to fix the rent in cash and from that stage till the matter came up before the Board of Revenue, no reference whatever was made to the question of cash rent—the whole procedure adopted by the Revenue Officer and the confirming authority having proceeded on the basis that the rent was to be fixed in kind—and the date with reference to which settlement of rent in cash could be made were never investigated and collected, and when further the ryots objected to the fixing of cash rents during the course of the proceedings before the Board when it gave the parties an opportunity to show cause why cash rents should not be fixed, and the Board passed an order fixing rents in money on the basis of a conversion rate calculated on the average price of the last ten years:

Held, (1) that the Board acted without jurisdiction in fixing the money rents and that a mere conversion of the paddy rate fixed by it into money on the basis of the average price of the last ten years would not amount to a settlement of rent on a cash basis;

(2) that if the Board had thought that it would be proper to fix rents on a cash basis, it must have sent the papers back to the Revenue Officer to make a re-settlement on that basis and not merely given him a direction to carry out a simple process of conversion of paddy rent into money rent at a price fixed by the Board itself.

Quaere.—Whether a settlement of rent under Chapter XI can be only on a cash basis?

Appeal against the decree of the Court of the Subordinate Judge of Kumbakonam in Original Suit No. 1 of 1933.

K. S. Krishnaswami Aiyangar and *S. Ramachandra Aiyar* for Appellant.

T. R. Venkatarama Sastri for *M. S. Venkatarama Aiyar* for Respondents.

The judgment of the Court was delivered by

Varadachariar, J.

Varadachariar, J.—This appeal arises out of a suit instituted by the tenants of an inam village in the Tanjore District, for a declaration that the entry in the record of rights, published

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in the village on 22nd June, 1932, with reference to the rent payable by the ryots in respect of their holdings cannot be enforced. This publication was made in pursuance of a notice issued by the Sub-Collector of Kumbakonam on 10th June, 1932 (Ex. F) and that notice was given in pursuance of an order of the Board of Revenue (Ex. D), dated 6th May, 1932. It is this order of the Board of Revenue that is really challenged in the plaint. The order was passed by the Board in the course of proceedings taken under Chapter XI of the Madras Estates Land Act on an application made by the ryots for the preparation of a Record of Rights and for the settlement of rents in the village. The action is not one under S. 173 of the Act and it is not based on any of the grounds specified in cl. (3) of that section. As pointed out in *Zamindar of Khallikote* v. *Beero Pollai*[1], the suit is one under the general law and is based on the ground that in passing the order, Ex. D, the Revenue Board acted without jurisdiction and that in settling the rents and proclaiming the same in pursuance of that order, the Sub-Collector was not acting as the Revenue Officer exercising his powers under the Act, but merely as the mouth-piece of the Revenue Board (cf. *Sappani Asari* v. *Collector of Coimbatore*[2] and *Mahabunnessa Bibi* v. *Secretary of State for India*[3]).

The learned Subordinate Judge made a declaration to the effect that the order of the Sub-Collector dated 10th June, 1932, directing the publication of the Record of Rights incorporating the settlement of rent made by the Board of Revenue in its order, dated 6th May, 1932, is *ultra vires* and made without jurisdiction. It is against this decree that one of the landholders has preferred this appeal making the ryots and the other landholders respondents. Objection has been taken to the form of the decree as not corresponding to the prayer in the plaint; but it is much more satisfactory to deal with the real points in controversy between the parties and the objection to the form of the decree is not of much significance.

To bring out the grounds on which the validity of the Revenue Board's order has been attacked, it is necessary very briefly to narrate the history of the settlement proceedings. The Sub-Collector of Kumbakonam (who acted as the " Revenue

1. (1935) 71 M.L.J. 118: I.L.R. 59 Mad. 825 at 848 (F.B.).
2. (1902) 12 M.L.J. 417: I.L.R. 26 Mad. 742.
3. (1925) I.L.R. 53 Cal. 561.

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Officer" in this case) passed an order on 28th June, 1930, in the following terms:—

"Fifty kalams of paddy for one veli of wet land seem to be fair and equitable rent for the village. . . . . I therefore declare that a rent of fifty kalams for one veli of wet land may be fixed."

According to the pre-existing rights of the parties, based on the pattas then in force, the landholders claimed that they were entitled to rent at a much higher rate. They accordingly preferred objections to this order of the Revenue Officer under S. 169; and when dealing with the objections, the then Sub-Collector fixed sixty-five kalams per veli of wet land as a fair and equitable rent. This rent was fixed as payable not merely when a single crop was grown but also for both crops together when two crops were grown. The matter went up before the Collector of Tanjore as the "confirming authority." He agreed with the Revenue Officer so far as the fixing of sixty-five kalams per veli was concerned, but he added that the ryot will be liable to pay additional rent for *thaladi* or second crop cultivation. In paragraph 11 of his order, he directed the Sub-Collector to complete the rent roll and revise it in accordance with the Sub-Collector's conclusions and the observations contained in the order of the Collector and to submit it for final confirmation. This order of the Collector was passed on 17th August, 1931.

It appears from the pleadings that some appeals had been preferred to the Board of Revenue against the Revenue Officer's order but in all probability the appeals were preferred too late. However, there were also three revision petitions to the Board, two by the landholders in October, 1931, and one by some of the ryots in November, 1931. When these revision petitions came on before the Board on 19th February, 1932, a suggestion was thrown out that the rents might be settled in cash and both parties were asked to show cause at the adjourned hearing why cash rents should not be fixed. The petitions came on finally before Mr. (now Sir Charles) Souter on 6th May, 1932. By the order then passed, the Board fixed the landlord's share at eighty-seven kalams per veli instead of sixty-five kalams fixed by the Collector, the main reason being that the proportion of sixty and forty in which according to the custom of the village the crop was divisible between the landholder and the ryot should be worked with reference to the gross yield and not after allowing a deduction for expenses of

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cultivation. The order next proceeded to deal with the question whether the rent should not be fixed in cash; and, holding that that was the proper thing to do, it directed conversion into cash at the average price of Rs. 2-15-0 per kalam (as reported by the Collector) subject to a deduction of fifteen per cent. on account of the distance of the village from the nearest town market. The Sub-Collector was asked to work out money rents on the above basis.

The validity of this order has been challenged in the plaint on several grounds. Three grounds in particular have been pressed before us: (1) that the order is not one passed under S. 172 of the Estates Land Act and that if it was intended to be one under S. 172 the Board had no power to interfere in revision at that stage; (2) that in proceedings under Chapter XI the Board had no power to fix a money rent in respect of a village where only rent in kind had hitherto been in vogue; and (3) that the Board of Revenue could even under S. 172 only *dircct* a revision and not itself fix the rent. It is unnecessary to refer in detail to the judgment of the lower Court and the views expressed in that judgment on the above points. There has undoubtedly been some uncertainty and conflict of judicial opinion on the interpretation of some of the relevant sections of the Act and the learned Subordinate Judge when he pronounced judgment had not before him the later decision of this Court in *Zamindar of Khallikote* v. *Beero Pollai*[1].

Out of the three objections above referred to, we may state that we do not see much force in the first or in the second. It is true that at the time the order of the Board was passed, the Revenue Officer had not completed the settlement in accordance with the directions of the confirming authority nor had the republication under cl. (3) of S. 170 been made. But we are not prepared to interpret S. 172 of the Act as giving powers of revision to the Board only after the republication under S. 170, cl. (3), had been made. All that S. 172 does is to fix the outer limit of time within which the powers of revision may be exercised, namely:

"At any time within two years from the date . . . . . of republication under sub-S. (3) of S. 170."

This does not necessarily imply that the Board has no power of interference before the republication. Its powers as

1. (1935) 71 M.L.J. 118: I.L.R. 59 Mad. 825 (F.B.).

an appellate authority under S. 171 can certainly be invoked and exercised independently of the question of confirmation by the Collector or republication under S. 170, cl. (3); under the provisions of S. 174 the orders passed under S. 171 are directed to be incorporated in the settlement record already published under S. 170 (3). S. 172 gives the Board powers of revision both *suo motu* and on the application of parties. We see nothing either in the language of the section or in the reason of the thing to justify the view that even where the Board is satisfied that the proceedings before the Revenue Officer require to be set right, it must wait till after the procedure under S. 170 has been gone through and cannot interfere at an earlier stage and give necessary directions. It may often be convenient and help to save time to give the directions at the proper stage instead of waiting for the formal completion of the settlement records. Whether, in any particular case, the Board will find it more convenient to adopt the one course or the other is a different matter; but it seems to us that there is no warrant for saying that the Board has no jurisdiction to exercise its revisional powers till *after* the settlement record has been republished after confirmation by the Collector.

Similarly, it seems to us that there is nothing in the scheme of Chapter XI to restrict the authorities settling the rent to the system of payment theretofore in vogue. Circumstances are conceivable in which the settlement of a fair and equitable rent can be better accomplished by fixing a rent in money. The provision in S. 178 against the commencement or continuation of proceedings under Ss. 30, 38 and 40 of the Act during the pendency of settlement proceedings clearly implies the possibility that what could be done under these three sections might be done as part of the settlement proceedings. Here again it is one thing to say that the settlement officer is not bound to carry out the duties imposed upon the Collector under Ss. 30, 38 and 40 in independent proceedings, but a different thing to say that the settlement officer has no power to do such things even when he thinks it necessary to adopt that course in order to effect a satisfactory settlement of rent. The decision in *Ryots of Garabanda, etc., Villages* v. *Zamindar of Parlakimidi*[1] and r. 22 of the rules framed by the Local Government under the Act clearly assume that in the course of the settlement

1. (1938) 1 M.L.J. 68: I.L.R. (1938) Mad. 858.

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proceedings steps like those contemplated by Ss. 30, 38 and 40 of the Act might be taken.

It remains to deal with the third ground of objection, namely, that S. 172 only contemplates the Board *directing* a revision by the subordinate authority and not the fixing of rent by the Revenue Board itself. That this is the appropriate construction of S. 172 was laid down in *Zamindar of Khallikote* v. *Beero Pollai*[1], following *Zamindarini of Mandasa* v. *Ryots of Mandasa Zamindari*[2]; but it was also laid down in those cases that in certain circumstances a procedure which goes farther than merely direct a revision by a subordinate authority might not amount to anything more than an "irregularity". Whether what has happened in any particular case must be regarded as only an irregularity or as something done without jurisdiction or in excess of jurisdiction will depend upon the circumstances of each case. If, on the facts of any particular case, what the Board did in addition to what is contemplated by S. 172 amounted to little more than a mere arithmetical calculation or something of that kind it might well be held that though it was unnecessary there was nothing in the nature of excess of jurisdiction in the exercise of such powers. Where on the other hand the Board has proceeded to do something which is really more than a ministerial or arithmetical step and which if it had been directed to be done by the Revenue Officer would have involved a consideration of a number of matters which were not and could not have been before the Board at the time that it passed such order, it will only be reasonable to hold that so much of the Board's order as goes beyond what is contemplated by S. 172 is done without jurisdiction. Dealing with the order of the Board in the present case in the light of this test, we are of opinion that the Board acted without jurisdiction in so far as it fixed money rents on the basis of a conversion rate of Rs. 2-15-0 per kalam subject to a deduction of fifteen per cent. for cartage, etc., charges.

It is a matter of some significance in this case that at an early stage in the proceedings when the matter was before the Revenue Divisional Officer, the landlord *opposed* the proposal to fix the rent in cash. [*See* Ex. G, paragraph 2 (*b*).] From

1. (1935) 71 M.L.J. 118: I.L.R. 59 Mad. 825 (F.B.).
2. (1932) 65 M.L.J. 423: I.L.R. 56 Mad. 579.

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that stage till the matter came up before the Board of Revenue, no reference whatever was made to this question of cash rent and the whole procedure adopted by the Revenue Officer and by the confirming authority proceeded on the basis that the rent was to be fixed in kind. The data with reference to which settlement of rent in cash could be made were therefore never investigated and collected. It is true that when the matter was before the Board the parties were given an opportunity to show cause why cash rents should not be fixed; we are informed that at that stage the ryots objected to the fixing of cash rents. The matter seems to have been argued only as a point of law and the Board of Revenue, so far as one can judge from the terms of Ex. D, seems to have been of the opinion that a settlement of rent under Chapter XI can be *only* on a cash basis. We are not sure that Chapter XI can be so restricted; but we should not have thought fit to interfere with the Board's order merely on the ground of this error if, after deciding that the settlement should be on a cash basis, the Board had sent the case back to the Revenue Officer to settle rents on a cash basis after making the necessary investigation. As we have already observed, this is the procedure contemplated by S. 172. The Board seems to have assumed that a mere conversion of the paddy rate fixed by it into money on the basis of the average price of the last ten years would amount to a settlement of rent on a cash basis. With all respect, we do not think that that is what was contemplated by the Legislature as the settlement of rent in cash. If it had at all been present to the mind of the Revenue Officer that the rent payable by the ryots should be fixed in cash, he would have investigated a number of matters relevant to that question. Even in proceedings under S. 40, the average of the last ten years excluding famine years is only *one* of the factors to be taken into account; and in proceedings for settlement of rent it must be *a fortiori* be true that the average price of the preceding ten years is not the only factor to be considered. In these circumstances, we are unable to hold that what the Board did in the present case in the matter of fixing cash rent is within the powers conferred upon it by S. 172. If it had thought that it would be proper to fix rents on a cash basis, it must have sent the papers back to the Revenue Officer to make a re-settlement on that basis and not merely given him a direction to carry out a simple process of conversion of

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paddy rent into money rent at a price fixed by the Board itself. We however see no objection to the rest of the Board's order on any ground of jurisdiction.

The result is that this appeal must be allowed in part. In modification of the lower Court's decree the order of the Board and the consequent settlement of rent by the Sub-Collector will be declared *ultra vires* only in so far as they related to the conversion of the paddy rent fixed by the Board into money rent. In the circumstances, we direct the parties to bear their respective costs in the appeal.

K.C. —— *Appeal allowed in part.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Allahabad.]

PRESENT:—LORD ROMER, LORD PORTER, LORD SALVESEN, SIR LANCELOT SANDERSON AND SIR FRANK MACKINNON.

Ram Kinkar Banerjee, since deceased (now represented by Sreemati Saibalini Devi and others) .. *Appellants**

v.

Satya Charan Srimani and others .. *Respondents.*

P.C.

Ram Kinkar Banerjee v. Satya Charan Srimani.

Mortgage—English mortgage—Mortgage by lessee—Assignment of term to mortgagee—Whether mortgage an absolute transfer of mortgagor's interest—Nature of interest retained by mortgagor—Whether privity of estate created between lessor and mortgagee—Distinction between English and Indian Law—Transfer of Property Act (IV of 1882), S. 58.

The Transfer of Property Act (IV of 1882) is a self-contained Code, by which alone the rights of mortgagor and mortgagee should be ascertained in India and under which statutory and not equitable rights were brought into existence. S. 58 (*e*) of the Act does not determine what legal effect follows from the use of particular form of words; it merely prescribes the form of words necessary to constitute what is known in India as an English mortgage. The substantial rights are dealt with in Ss. 58 (*a*) and 60 of the Act Whatever form is used nothing more than an interest is transferred and that interest is subject to the right of redemption.

In England the mortgagor has an equitable interest in the property both before and after the contractual date of payment has elapsed: before, because he has a contractual right to have the property reconveyed; after, because in equity time is not of the essence of the transaction. In each case he has an equitable estate, though in the former he has not yet an equity of redemption. In India the same distinction exists between the position before and after the date of payment. Before the date the mortgagor has an interest in the land which is legal and not equitable. After that date he has the

* P. C. Appeal No. 51 of 1937. Bengal Appeal No. 20 of 1935. 29th November, 1938.

legal right of redemption given him by S. 60 of the Act. In each case he retains a legal interest in the property.

P.C.

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Held, that in India when a mortgagor assigns his interest under a lease to a mortgagee he does not under any of the forms prescribed by S. 58 of the Act transfer an absolute interest within the principle established in England by the case of *Williams* v. *Bosanquet*, (1819) 1 Brod. & Bing. 238: 129 E.R. 714, and consequently the mortgagee is not liable by privity of estate for the burdens of the lease.

Appeal from a decision dated 20th May, 1935, of the High Court at Fort William, Bengal (Guha and Lodge, JJ.) reversing a decision of the Additional Subordinate Judge, Asansol, Burdwan District, dated 20th April, 1931, given in favour of the plaintiffs, the present appellants.

The appellants, the representatives of Ram Kinkar Banerjee deceased, held certain underground rights in the district of Burdwan for a lease of 999 years from 26th May, 1908. Acting on the power of alienation given by the lease, the grantees transferred the property subject to various covenants to one, Martin, by a grant which in form transferred the whole of the appellants' term. After various mesne assignments, Martin's leasehold interest became vested in one, Patel, one of the respondents. In May, 1923, Patel executed two mortgages of his leasehold interest, the second subject to the first, the main provisions in them being (1) a promise by the mortgagor to repay; (2) conveyance of the mortgaged property; (3) a proviso for reconveyance by the mortgagee on repayment of the mortgage moneys; and (4) a covenant for the payment of monthly interest. The first mortgage was in 1928 transferred to the respondents Worah and Dosa. The respondent Srimani was a mortgagee under the second mortgage. The rent due under the sub-lease to Martin having fallen into arrear, and other covenants of that lease remaining unperformed, the appellants sued the respondent mortgagees for performance of the terms of the sublease in question in respect of the periods for which those parties had respectively had an interest in the property. The Additional Subordinate Judge held the mortgagees liable by privity of estate between them and the appellants as lessors in accordance with the principle laid down in *Williams* v. *Bosanquet*[1]. The Appellate Court reversed that decision, holding that the whole of the mortgagor's interest in the property did not pass to the mortgagees so as to create privity of estate between them and the appellants. The appellant mortgagors thereupon preferred an appeal to the Privy Council.

Cyril Radcliffe, K.C. and *J. M. Pringle* for Appellants.—Apart from the question whether or not these mortgages were

1. (1819) 1 Brod. & Bing. 238: 129 E.R. 714.

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"English mortgages" as defined in S. 58 of the Transfer of Property Act, the important point about them is that an instrument which determines the rights of the parties is expressed in clear terms to be transferring to the mortgagees what the mortgagor himself holds; the consequence in England would clearly be that the mortgagee became by assignment directly liable to the lessor for rent. The question is whether such a position is in any way inconsistent with Indian law. The real question is whether there has been an assignment, not whether the mortgages can or cannot be made to fit into the definition of an English mortgage. Counsel referred to *Falakrishna Pal* v. *Jagannath Marwari*[1], *Bank of Upper India* v. *Administrator-General of Bengal*[2], *Hunsraj* v. *Bejoy Lal Seal*[3] and to Fisher on Mortgages, 7th Ed., p. 376.

Dunne, K.C., T.J. Strangman, L.P.E. Pugh, K.C., Mrs. M.J. Clark and *Ganguli* for Respondents.—It is submitted that one of the objects of the Transfer of Property Act was to avoid the introduction of English law into that subject. *Kannye Loll Sett* v. *Nistoriny Dossee*[4], deals with a mortgage before 1882. Counsel also referred to *Kunhanujan* v. *Anjclu*[5]. In 1882 the Act got rid of the element of English law and laid down in compendious form the law for India. It is not permissible to do what the appellants contend for, namely, to treat sub-S. (*e*) of S. 58 as establishing something quite separate from sub-S. (*a*). The fact that a mortgage is what has been called an English mortgage does not signify that English law is to be applicable. Mortgages under the Act transfer only an interest in the mortgaged property.

Lord Romer.—According to *Bengal National Bank, Ltd.* v. *Janaki*[6], I do not see how the mortgagor can create a second mortgage.

Dunne, K.C.—S. 58(*a*) appears not to have been considered in that case, which seems to treat the existence of an English mortgage as necessarily importing the doctrine in *Williams* v. *Bosanquet*[7]. Counsel referred to *Falakrishna Pal* v. *Jagannath Marwari*[1].

Radcliffe, K.C., in reply. None of the authorities negative the possibility of privity of estate between the mortgagee and the lessor of the mortgaged property. The purport of the Transfer of Property Act was not to lay down an exclusive Code, but to define and amend the existing law. The Courts in India are entitled to apply English Law to cases not covered by the terms of the Act,

1. (1932) I.L R. 59 Cal. 1314. 2. (1917) I.L.R. 45 Cal. 653.
3. (1929) 58 M.L.J. 293. L R. 57 I.A. 110: I.L.R. 57 Cal. 1176 (P.C.).
4. (1884) I.L R. 10 Cal 443. 5. (1893) I.L R. 17 Mad 296.
6. (1927) I.L.R. 54 Cal. 813 at 824, 825.
7. (1819) 1 Brod. & Bing. 238: 129 E.R. 714.

and the Act nowhere deals with the question of privity of estate between mortgagee and lessor, or lessor and assignee of lessee. The effect contended for as flowing from these mortgages is not inconsistent with anything in the Act. The other side's contention is that S. 58 (*a*) made it impossible for a lessee to assign his interest absolutely by way of mortgage; but (*a*) and (*e*) must be read together and construed reasonably, and the language of (*e*) shows by its variation that it is dealing with the absolute transfer of the mortgaged property. To the argument that, if a mortgagor transfers the whole of his interest in the property to the mortgagee, there can be no second mortgage, the answer is that the mortgagor still has available for transfer his statutory right of redemption under S. 60. S. 58 speaks of an absolute transfer, and the statutory right of redemption does not modify the meaning of those words.

29th November, 1938. Their Lordships' judgment was delivered by

Lord Porter.

LORD PORTER.—In this case the original plaintiff has died since the institution of the suit, and his interests are now represented by one Sreemati Saibalini Devi and others. Hereafter they will be referred to as the appellants.

There were originally a large number of defendants, but three only are made respondents to this appeal and their interests alone remain to be considered.

The others have either accepted the judgments given against them or have been dismissed from the case. The three remaining are Kripa Sankar Worah and Jatha Shankar Dosa, numbered 2 and 3 in the cases presented by the parties, and Satya Charan Srimani, respondent No. 1 in those cases.

The facts may be briefly stated. The appellants are the successors in title to the grantees of a patta or lease for 999 years dated the 26th May, 1908, in respect of certain underground rights in the District of Burdwan. This lease contained provisions (*inter alia*) for (*a*) the payment by the grantees to the grantors of all cesses levied by the Government on account of the income of the colliery, (*b*) the payment of a minimum royalty, (*c*) the provision of certain quantities of coal.

The lease contained a clause giving the grantees liberty to alienate the property by making gifts, sales, sub-leases or any other kind of transfer to any respectable persons or company.

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The grantees took advantage of this provision and on the 3rd June, 1908, transferred the property to one J. C. Martin. The terms of the document were similar to those of the lease of the 28th May, except for certain increases in the burdens imposed on the lessees. In form this grant, which is described as a "settlement," transfers the whole, and indeed more than the whole, of the original grantees' term to the sub-grantee, and would under English law amount to an assignment of the head lease, but it is well established by Indian law, and is common ground to both parties in the present case, that such a transfer operates by way of sub-demise and not of assignment, see *Hunsraj* v. *Bejoy Lal Seal*[1].

After various mesne assignments Martin's leasehold interest became vested in Ardhesir K. Patel, who is respondent No. 7 in the present appeal.

On the 18th May, 1923, Patel executed two mortgages of his leasehold interest (1) of an undivided moiety of the underground rights or colliery, (2) of the whole colliery but subject to the previous mortgage of the undivided moiety.

Both are in the form which a mortgage in England by assignment of the sub-term would take in that they contain (1) promises by the mortgagor to repay, (2) conveyances of the mortgaged property, (3) provisoes for reconveyance by the mortgagees to the mortgagor upon repayment of the mortgage money.

The consideration for the first mortgage is expressed to be a debt of Rs. 49,500, and the mortgagor promises to pay this sum as to Rs. 15,000 in the course of nine calendar months from the date of the mortgage, and the balance by four equal yearly instalments of Rs. 8,625 beginning on the 1st April, 1925, the last instalment falling due on the 1st April, 1928.

The consideration for the second mortgage is expressed to be Rs. 50,500 repayable on the 18th May, 1928, with interest.

In the case of each mortgage monthly interest is stipulated for, and the conveyance is stated to be subject to the terms of the leases and subject to the proviso for redemption contained in the mortgage itself; the mortgagor covenants to pay the charges and royalties due under the lease and to fulfil its other obligations, but the mortgagee is permitted to make these pay-

1. (1929) 58 M.L.J. 293: L.R. 57 I.A. 110: I.L.R. 57 Cal. 1176 (P.C.).

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ments if not made by the mortgagor, and to recover them from him, and, until payment, to add them to the mortgage security; in case of default in payment of the moneys secured, the mortgagee is empowered to enter into possession of the mortgaged property.

If the terms of the mortgages are fulfilled the mortgagors are entitled in each case to remain in possession of the mortgaged premises and carry on the colliery business thereon, but the mortgages differ in that in the case of the first it is provided that on default of payment of the money secured the mortgagee may enter into possession and work the collieries on giving three months' notice in writing, whereas in the second, though he may enter on non-payment of the principal sum on the 18th May, 1928, yet if the mortgagor duly pays the interest the mortgagee undertakes not to recall the mortgage money until the 18th May, 1933, unless default is made in payment of interest for 37 months.

The first mortgage was duly transferred to the respondents Worah and Dosa on the 17th April, 1928, and the respondent Srimani, when this suit was instituted, was still the mortgagee under the second mortgage.

None of the mortgagees ever entered into possession, but, the rent reserved by the sub-lease to J. C. Martin having fallen into arrear and the covenants and conditions remaining unperformed, the appellants on the 15th July, 1929, instituted the present suit in the Court of the Subordinate Judge of Asansol, claiming against all the defendants the performance of the terms of the sub-lease at any rate during such period as they had an interest in it.

To that suit the representatives of the sub-lessees and various assignees were made defendants, and judgment appears to have been given for the full amount awarded against all except two defendants, one of whom was interested under the terms of a deed of gift made by Patel on the 1st December, 1925, and the other of whom was the manager of the person so interested. Another defendant who had been appointed receiver by the Court in a mortgage action taken by the mortgagees against the mortgagor also subsequent to the period for which rent was claimed has been dismissed from the suit by the Appellate Court.

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No question now arises as to these parties. The only appellants are the two sets of mortgagees whom the Subordinate Judge held liable upon the principle applied in English law ever since the decision of *Williams* v. *Bosanquet*[1]. The grounds of that decision were that, if mortgagees of a term become assignees of the mortgaged property under the terms of the mortgage-deed, they are liable, unless and until they re-assign the property, for the rent reserved by and upon the covenants contained in the sub-lease because privity of estate has been established between them and the lessor by reason of the assignment. The Court did not decide in the present case that this liability existed in India in all cases, but only in those in which the form there known as an "English mortgage" is used. The mortgages in question he held to be English mortgages.

The Appellate Court reversed this judgment on the ground that the mortgages in question were not English mortgages and that, even if they were, the whole of the right, title and interest of the mortgagor in the property did not pass to the mortgagees by virtue of their terms.

From that judgment the appellants appeal to His Majesty in Council.

By English law and by Indian law an assignee of a lease is liable by privity of estate for all the burdens of the lease, burdens which are imposed upon him by the mere assignment whether he enters into possession or not. See *Kunhanujan* v. *Anjelu*[2] and *Monica* v. *Subraya Hebbara*[3].

The ground upon which he is held liable is that the whole of the assignor's interest has passed to him by the deed of assignment and that the assignor, having no longer any interest, cannot be liable by privity of estate though he still remains liable by contract if he was party to the original lease.

Under the English system of law *Williams* v. *Bosanquet*[1] decided that, in cases where the ordinary form of mortgage, in use in this country before the passing of the Law of Property Act of 1925, is adopted, the whole of the lessee's interest passes to his mortgagee notwithstanding that an equity of redemption remains in the mortgagor.

1. (1819) 1 Brod. & Bing. 238: 129 E.R. 714.
2. (1893) I.L.R. 17 Mad. 296.
3. (1907) 17 M.L.J. 258: I.L.R. 30 Mad. 410.

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If this were true also in India the same result would follow. Their Lordships therefore have to determine whether under the Indian system of law the whole interest of a mortgagor of a lease does in any, and, if so, in what, circumstances pass to his mortgagee.

Until 1925 the usual form of mortgage in England, whether of a fee simple or of a lease, was the transfer by assignment of the mortgagor's interest in the property with a proviso for re-assignment upon payment of the mortgage money by a particular date. After that date had passed, the mortgagor's rights at law had determined and the mortgagee was in law the absolute owner of the property. But in equity the mortgagor still retained a right to redeem, and, upon payment of the debt and interest, to have the property reconveyed to him. This right he retained unless and until by judgment for foreclosure, or (possibly) by the operation of the Statute of Limitations, the character of creditor was changed for that of owner, or until the interest of the mortgagee was destroyed by sale either under the process of the Courts or of a power contained in the mortgage itself. This right was an equitable right and under English law did not prevent the whole legal interest of the mortgagor from passing to the mortgagee despite his retention of the equity of redemption. The whole legal estate passed, nevertheless the right which he retained, though equitable only, was an estate in the land, and was not merely a personal contract on the part of the transferor.

Up to the time of the passing of the Transfer of Property Act the rights of mortgagors and mortgagees of land in India were subject to much controversy, though in general the law of England, subject to such modification as justice, equity and good conscience required, was recognised as the law of India also. But whether the English rules of equity were applicable to such cases was not certain. Since the passing of that Act, however, the distinction drawn in England between law and equity in such cases does not exist in India.

As Sir George Rankin says in *Bengal National Bank, Ltd. v. Janaki*[1], "The Transfer of Property Act has left no room for such a distinction."

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1. (1927) I.L.R. 54 Cal. 813 at 822.

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The Indian mortgagor, however, retains some rights though the English rules of equity do not apply. He retains a right to a reconveyance of the land and a right to transfer such right by way of sale or second mortgage (*see* Ss. 81, 82, 91 and 94) and this right in India is a legal right. When therefore the mortgagor transfers his property by way of mortgage can he be said to transfer his whole interest? Russell, J., in *Vithal Narayan's case*[1], answers the question thus:—"In India there is no equity of redemption in the lessee (mortgagor) and there being no distinction between his legal and equitable estate, his 'whole estate' is not transferred by the mortgage." The observation is general though in the particular case Russell, J., was dealing with a mortgage in a form widely different from that employed in England.

Apart from the two cases referred to above, the Indian authorities recognise the principle that the distinction between law and equity has no place in Indian law. For this proposition reference may be made to two of the cases quoted by the appellants in argument, namely:—*Theethalan* v. *The Eralpad Rajah, Calicut*[2] and *Falakrishna Pal* v. *Jagannath Marwari*[3].

The same view is commonly accepted in the Indian text books (*see* Ghose's Law of Mortgage in India (5th ed., 1922), p. 335, and Mulla's Transfer of Property Act (2nd ed., 1936), p. 345) and was indeed adopted by the appellants in argument in the present case. Their contention was that the Act was a self-contained code by which alone the rights of mortgagor and mortgagee were to be ascertained and under which statutory and not equitable rights were brought into existence.

Their Lordships agree with this contention and accordingly turn to a consideration of those sections of the Act which deal with mortgages. S. 58 (*a*) of the Act enacts that a mortgage is a transfer of an interest in specific immovable property. Upon this definition there follows in the Act as in force at the material date an enumeration of four classes of mortgage, namely, (1) simple mortgage, (2) mortgage by conditional sale, (3) usufructuary mortgage, (4) English mortgage. Two other classes, equitable mortgage and anomalous mortgage, are

1. (1905) I.L.R. 29 Bom. 391.
2. (1917) 32 M.L.J. 442: I.L.R. 40 Mad. 1111 at 1114.
3. (1932) I.L.R. 59 Cal. 1314.

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recognized and dealt with in Ss. 59 and 98 respectively. Of these six, it is contended, the English mortgage by its terms amounts to, and the anomalous mortgage by its terms may amount to, a transfer of the whole interest of the mortgagor, and therefore, where the subject-matter is a lease, they create privity of estate between the lessor and the mortgagee of the lease.

No doubt in English law they would do so, but it does not follow that under a system in which equity has no place the same wording which would transfer the whole interest of the mortgagor under the former law would do so under the latter. The outlook is different. By Indian law the interest which remains in the mortgagor is a legal interest and its retention may therefore prevent the whole of the mortgagor's interest from passing to the mortgagee—a result which would not follow if an equitable interest only were retained. The Act itself contains some suggestions to this effect. S. 54, which deals with *Sale*, speaks of a sale as a transfer of ownership as opposed to the transfer of interest spoken of in S. 58 (*a*) in the case of a mortgage, and, though an interest may be absolute, the word, particularly when used in opposition to ownership, is more appropriate to a limited right.

To this argument the appellants reply that, whatever may be the case with other types of mortgage, S. 58 (*e*) in defining the term "English mortgage" speaks of an absolute transfer of the mortgaged property to the mortgagee. Its terms are, "Where the mortgagor binds himself to repay the mortgage money on a certain date and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will retransfer it to the mortgagor upon payment of the mortgage money as agreed, the transaction is called an English mortgage." By such a mortgage, they say, the mortgagor parts with his whole interest subject only to his statutory right of redemption given by S. 60 of the Act. The wording of S. 58 (*e*) undoubtedly gives rise to some difficulty, but, before considering the construction to be put upon it, the soundness of the appellants' general contention must be considered.

Under the English practice adopted before 1925 no difficulty arose; the mortgagor parted with his whole legal estate though he retained an equitable interest in the land itself. The mortgagee to whom the legal interest was transferred by the mort-

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gage-deed was accordingly held to have been brought by that transfer into direct relationship with the lessor by privity of estate and to be liable for the rent.

But under the Indian Act no equitable rights exist and therefore unless the mortgagor retains some legal interest in the land he has merely a contractual right to have it reconveyed. If he retains some legal interest it is difficult to say that he has parted with his whole interest. On the other hand, there are strong reasons against holding that he retains merely a contractual right against the mortgagee. If the case arose in England it would be possible to say that the contract for reconveyance gave the mortgagor an equitable interest in the land, but this argument is untenable in India. In the first place, as has been pointed out, equitable estates do not exist in that country, and in the second, under the provisions of S. 54 of the Transfer of Property Act, a contract for the sale of immovable property does not create any interest in or charge upon the land sold. Having this provision in view, it is difficult to see how a personal contract to reconvey can create any interest in the land itself.

But to regard the mortgagor's right of redemption as being merely contractual and as creating no interest in the land would make it impossible for him to assign his right of redemption or to create a second mortgage so as to bind the land.

Such a state of things is, of course, theoretically possible, but it is inconsistent with the provisions of the Act (which in Ss. 81, 82, 91 and 94 recognises second mortgages) and with the possibility, well established in India, of transferring the right of redemption to a purchaser.

Bearing these considerations in mind it remains to consider the effect of the wording of S. 58 (*e*) of the Act. That section speaks of the mortgagor transferring the "mortgaged property *absolutely* to the mortgagee." In using those words does it mean that no interest or no legal interest in the property remains in the mortgagor? Their Lordships cannot think so. If the sub-section stopped at the word "mortgagee" it might be necessary to put this construction upon it, but it does not stop there: it adds the proviso that the mortgagee "will retransfer" the property "upon payment of the mortgage money as agreed". Their Lordships think that with this addition the sub-section upon its true construction does not declare "an English mortgage" to

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be an absolute transfer of the property. It declares only that such a mortgage would be absolute were it not for the proviso for retransfer.

It does not determine what legal effect follows from the use of a particular form of words; it merely prescribes the form of words necessary to constitute what is known in India as an English mortgage.

S. 58 (*e*) deals with form not substance. The substantial rights are dealt with in Ss. 58 (*a*) and 60. Whatever form is used nothing more than an interest is transferred and that interest is subject to the right of redemption.

As has been stated, in the case of the first mortgage the contractual date of payment was the 18th May, 1928, and that date had passed before this action was begun. In the case of the second mortgage the mortgagee undertook not to recall the mortgage money until the 18th May, 1933, if the interest were duly paid. The distinction between a case where the date of payment has elapsed and that in which it has not yet been reached was alluded to in *Williams* v. *Bosanquet*[1], and it was pointed out that in the former case, the condition of repayment being unfulfilled, the transfer was unquestionably an absolute transfer. The Court, however, considered that the transfer would have been absolute even though the date of payment had not been reached.

In the present case, as in that, their Lordships think that no distinction in principle exists.

In England the mortgagor has an equitable interest in the property both before and after that date has elapsed: before, because he has a contractual right to have the property reconveyed; after, because in equity time is not of the essence of the transaction. In each case he has an equitable estate, though in the former he has not yet an equity of redemption. See *Kreglinger* v. *New Patagonia Meat, etc., Co.*[2], per Lord Parker, at p. 49. In India the same distinction exists between the position before and after the date of payment. Before that date the mortgagor has an interest in the land which for the reasons given above is legal and not equitable. After that date he has the legal right of redemption given him by S. 60 of the statute. In each case he retains a legal interest in the property.

1. (1819) 1 Brod. & Bing. 238: 129 E.R. 714.
2. (1914) A.C. 25.

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Their Lordships therefore think that in India a mortgagor, when he assigns his interest under a lease to a mortgagee, does not under any of the forms specified in S. 58 of the Act transfer an absolute interest within the principle established in England by the case of *Williams* v. *Bosanquet*[1], and consequently the mortgagee is not liable by privity of estate for the burdens of the lease.

In the past there has been a conflict of authority in India on the question. *Falakrishna Pal* v. *Jagannath Marwari*[2], may be instanced as adopting the arguments which commend themselves to their Lordships. *Kannye Loll Sett* v. *Nistoriny Dossee*[3] and *Bank of Upper India* v. *Administrator-General of Bengal*[4], suggest a different point of view. None of them decides the matter. *Bengal National Bank, Ltd.* v. *Janaki*[5], is a direct decision that the mortgagee is liable, certainly in the case of an "English mortgage," possibly also in the case of an "anomalous mortgage." But that case recognises the difficulty created by the difference of outlook between English and Indian law, and having regard to that difference their Lordships feel themselves unable to follow that decision.

In coming to this conclusion their Lordships think it unnecessary to discuss or determine what the rights of the parties would have been had the mortgagees entered into possession of the properties, or to determine whether the mortgages granted to the respondents or to their predecessors in title were English mortgages or not.

In their view the mortgage of a lease in any of the six forms referred to above is not an absolute assignment under Indian law and does not create privity of estate between the lessor and the mortgagee.

It was urged in argument before their Lordships on behalf of the respondents that the wording of S. 108 (*j*) of the Transfer of Property Act furnished support for the view that an assignment by way of mortgage was not absolute. That sub-section enacts that "the lessee may transfer absolutely or by way of mortgage or sub-lease the whole or any part of his interest in the property." This wording it was said makes a distinction

1. (1819) 1 Brod. & Bing. 238: 129 E.R. 714.
2. (1932) I.L.R. 59 Cal. 1314.
3. (1884) I.L.R. 10 Cal. 443.
4. (1917) I.L.R. 45 Cal. 653.
5. (1927) I.L.R. 54 Cal. 813 at 822.

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between absolute transfers and transfer by way of mortgage and so shows that the Act regards the latter as not being absolute.

Their Lordships, however, are not prepared to hold that the three classes of transfer are mutually exclusive. They are not necessarily so. For instance, a mortgage of a lease may be created by way of sub-lease.

But apart from this argument their Lordships are, as they have indicated, of opinion that the respondents are in the right.

They will humbly advise His Majesty that the appeal be dismissed with costs, and, as they think that the respondents were entitled to be separately represented, that the appellants should pay the costs of each of the two sets of mortgagees.

Solicitors for Appellants: *A. J. Hunter & Co.*

Solicitors for 1st Respondent: *T. L. Wilson & Co.*

Solicitors for other Respondents: *Callingham, Ormond* and *Maddox.*

R. C. C. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

M. Paramasivam Pillai .. *Appellant* (1st Plaintiff)*

v.

A. V. R. M. S. P. S. Ramasami Chettiar and another .. *Respondents (3rd Defendant and 5th Plaintiff).*

Paramasivam Pillai v. Ramasami Chettiar.

Deed—Surety bond—Construction—Liability fastened in the event of appeal being decided one way—Disposal of appeal—Party preferring further appeal under Letters Patent—Liability under final decision if enforceable.

An appeal was filed against an order appointing a receiver in a mortgage suit and at the same time an application was also filed for stay of further proceedings by the receiver, and stay was granted on condition that the appellant should give security for one year's income from the mortgaged property. The bond that was thereupon executed provided as follows:—"If the appeal preferred by me to the High Court against the order appointing receiver is decided in favour of the said first plaintiff, I shall pay into Court the one year's net income as aforesaid." The said appeal was allowed but there was a Letters Patent Appeal which was subsequently allowed so that finally the order appointing the receiver was confirmed. The decree-holder sought to proceed against the surety.

Held, that the bond did not provide for the liability of the surety in the event of a further appeal as against the decision in the appeal and that the

* A.A.O. No. 378 of 1936. 20th September, 1938.

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liability could not be enforced as against the executant consequent on the decision of the Letters Patent Appeal.

Appeal against the order of the Court of the Subordinate Judge of Tuticorin dated 14th April, 1936, and made in E. P. No. 8 of 1935 in O.S. No. 43 of 1929.

K. V. Sesha Aiyangar for Appellant.

K. S. Ramabadra Aiyar for Respondents.

The judgment of the Court was delivered by

King, J.

King, J.—The question in this appeal is whether in the circumstances of this case the decree-holder in O. S. No. 42 of 1929, on the file of the Subordinate Judge's Court of Tuticorin can proceed against the first respondent to recover from him the sum of Rs. 1,600 referred to in the surety bond executed by him in 1932. The facts are that O. S. No. 42 of 1929 was a suit upon a mortgage and in that suit at the instance of the mortgagee a receiver had been appointed. There was an appeal by the third defendant against this order appointing the receiver which was numbered as C.M.A. No. 375 of 1931 in the High Court. When the appeal was filed, an application was also filed for stay of further proceedings by the receiver and stay was granted on condition that the third defendant should give security for one year's income from the mortgaged property fixed at a sum of Rs. 1,600. In accordance with that order the third defendant executed a surety bond the terms of which are now in dispute. The actual sentence in which his liability is expressed runs as follows:—

> "If the C M.A. No. 375 of 1931 preferred by me to the High Court against the order appointing receiver, is decided in favour of the said first plaintiff, I shall pay into Court the one year's net income of Rs 1,600-7-4 as aforesaid."

C.M.A. No. 375 of 1931 was allowed but there was a Letters Patent Appeal against the decision of the learned Judge who decided it and that Letters Patent Appeal was also allowed so that the final decision of the High Court on the question of the validity of the order appointing the receiver was to confirm it. The decree-holder accordingly brought this application before the Court of first instance contending that on a true interpretation of the bond he was entitled to proceed against the surety. The learned Subordinate Judge rejected his application on the authority of two decisions of the Madras High Court. The decree-holder accordingly filed the present appeal.

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King, J.

The argument of the learned Counsel for the appellant has been reinforced by the citation of a large number of authorities but there is no clear authority which can deal with the facts of the present case and the only certain proposition of law which can be deduced from all the authorities cited is this that each bond must be interpreted according to its own terms. We are of opinion th t the terms of this bond are absolutely explicit. The bond definitely says that if a particular appeal (the number of which is given) is decided in favour of the plaintiff, the executant of the bond shall pay the money into Court. We do not find any language in this bond which extends the liability of the surety to the contingency which is not anywhere referred to of there being a second appeal against C.M.A. No. 375 of 1931. It may be, no doubt, that if the parties had drafted this bond more carefully and had thought of every possible eventuality, they would have made it clear that the surety shall be liable or not according to the final decision of the High Court in the matter. But although that might well be said to be the only reasonable conclusion to which the parties could have arrived had they discussed the matter in all its aspects, we have to deal with the bond as it has actually been drafted and if the decree-holder has permitted the surety to sign a bond which does not protect him in all the emergencies in which he intended to be protected, that is his misfortune and a misfortune which we cannot correct.

There is only one of the authorities quoted which we think it necessary to refer to and that is a decision of their Lordships of the Privy Council reported in *Raj Raghubar Singh* v. *Thakur Jai Indra Bahadur Singh*[1]. That was a case in many respects similar to this one because the parties referred in the bond specifically only to the order which the immediate appellate Court was about to pass. Their Lordships of the Privy Council held that to make the bond in that case applicable only to the immediate appellate decision would lead to strange results, and they set out the hypothesis of the appellate Court and the Second Appellate Court both giving decisions contrary to the decision which they actually gave They thereupon describe the surety bond as a form of wagering contract in which the liabilities of the surety depended upon the chances of the decisions

1. - (1919) 38 M.L.J. 302: L.R. 46 I.A. 228: I.L.R. 42 All. 158 (P.C.).

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given by two appellate Courts. But this is clearly not in our opinion an authority for holding that all security bonds are to be interpreted not according to their plain terms but in such a way as to make them the most reasonable bonds that the parties might have contemplated executing. Their Lordships say on page 165:

"It would be strange indeed if the language of the instrument had been such as to create a kind of wagering contract of this nature"

They then go on with words which appear to us to be of vital importance "but there is really no difficulty in the language of the instrument". They point out that the bond relates not only to the immediate appeal judgment of the appellate Court but to any order which the appellate Court might pass at any time and they show how after the appellate Court's judgment had been set aside by the second appellate Court the appellate Court did pass later orders in accordance with the orders of the second appellate Court, and therefore that within the plain meaning of the terms of the bond the liability of the surety was clear. As already pointed out, in the present case there is no reference to any such contingency as a further order by the High Court whether by the original Judge or by any bench which might sit in appeal over his decision. The words are clear and explicit. "If a particular C.M.A. (the number of which is given) is decided in a particular way".

We are accordingly of opinion that there are no sufficient reasons for differing from the interpretation of this bond at which the learned Subordinate Judge has arrived and this appeal must accordingly be dismissed with costs.

We would like however to point out that it is very probable in this case that what might or would have been the real intention of the parties has not been correctly expressed in the bond which has been signed. We feel that may be due in some measure to a too rigid adherence to the forms of bonds which are provided by Appendix G of the Code of Civil Procedure. We notice that Form No. 2 in that appendix which deals with security bond to be given on order being made to stay execution of a decree deals in terms only with one appeal and one appellate Court. We think it likely that much time might be saved in hearing appeals of this kind and possibly much real injustice might be obviated if parties and Courts which order the execution of such bonds could be guided by a different form modifying

the form actually given in Appendix G and using language appropriate for dealing with all possible eventualities, due provision being made in certain circumstances for more appeals than one.

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B.V.V. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE MADHAVAN NAIR.

Govindaraja Pillai .. *Appellant** (*Plaintiff*)

v.

Vanchinatham Pillai .. *Respondent* (*Defendant*).

Govindaraja Pillai v. Vanchinatham Pillai.

Malicious prosecution—Gist of an action for.

Where the respondent filed a complaint against the appellant for suppressing the discovery of a treasure trove and charged him with an offence under the Indian Treasure Trove Act, but the proceedings before the Magistrate resulted in the discharge of the appellant, and the appellant filed subsequently a suit for malicious prosecution against the respondent,

Held, that the appellant was entitled to succeed in a suit for malicious prosecution against the respondent, if he could show that the earlier proceedings were instituted maliciously and in the absence of reasonable and probable cause.

Appeal against the decree of the District Court of Trichinopoly in O. S. No. 4 of 1932.

K. S. Sankara Aiyar for Appellant.

K. Bashyam Aiyangar and *T. R. Srinivasan* for Respondent.

The judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—The appellant sued the respondent in the District Court of Trichinopoly for damages for malicious prosecution. The learned District Judge dismissed the suit on the ground that the complaint did not justify the institution of criminal proceedings. The learned District Judge here erred and for reasons which I shall state the case must be remanded to the District Court for disposal according to law.

There is no doubt that in 1928 enmity did exist between the appellant and the respondent and had existed for a considerable time. The appellant is the Village Munsif of Elayaperumanallur, and the respondent is his cousin residing in the same village. In the house of the appellant is a family idol and at certain seasons of the year offerings are made by the villagers to this idol.

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*Appeal No. 301 of 1933.   11th March, 1938.

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Leach, C.J.

These offerings are divided among nine sharers, representing three branches of the appellant's family. The respondent is one of the sharers. Whether the division of these offerings was the cause of enmity between the parties does not appear. On the 14th March, 1928, the respondent submitted a petition to the Sub-Divisional Magistrate, Ariyalur, stating that there was a rumour current in the village that the appellant had hidden certain treasure trove which had been discovered on the land of one Dasi Gnanambal and asking the Sub-Divisional Magistrate to inquire into the matter. Whether the Magistrate directed the Tahsildar to inquire into the matter is not disclosed, but we do know that the Tahsildar went to the village and made an investigation. Subsequently, the Police Inspector was authorised by the Sub-Divisional Magistrate to make an inquiry. The Police Inspector searched the appellant's house and found certain old jewellery in a brass pot which appeared to be an old one. The jewellery was seized by the police, but no further action was taken. On the 8th July, 1928, the respondent presented a petition (Ex. B) to the Deputy Magistrate in which he accused the appellant and five others, whose names were given, of having suppressed the finding of treasure trove. As the learned District Judge has held that this petition did not justify the institution of criminal proceedings it is necessary to examine it. The petition opens as follows:—

"About 7 or 8 months ago, the undermentioned persons and certain other persons were ploughing, for wages, the patta land opposite to the house of Dasi Gnanambal in Gangaikondapuram village. At that time, a brass vessel buried under the earth struck against a plough share. The persons who were there conspired together and took possession of the treasure trove and the undermentioned persons arranged to sell some of the jewels such as valuable diamond set jewels, gold blocks, jewels, etc., of olden days which cannot be had in these days. This information leaked in the village and I sent a petition to your honour immediately."

The petition then proceeds to make reference to the Tahsildar's investigation and to the search conducted by the Police, and concludes as follows:—

"This is a case where the Government stands to gain much. If your honour should personally take up the matter for enquiry, I am prepared to produce proper witnesses, that is to say, those who saw the treasure trove being dug out and those who purchased the articles. As the Police did not take proper interest in this case, they referred the matter. I therefore pray that your honour may specially take up this petition for enquiry."

On the same date the respondent addressed another petition to the Sub-Magistrate, Udayarpalayam. This petition was

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somewhat differently worded, but made the same accusations. The complaint to the Deputy Magistrate, Ariyalur Division, was forwarded to the Sub-Magistrate for disposal. The Sub-Magistrate then recorded a sworn statement from the respondent. This statement was to the effect that the appellant and others whose names were mentioned had found treasure and had suppressed their discovery. As the result of the complaint and this sworn testimony a charge was framed against the appellant under S. 20 of the Indian Treasure Trove Act, 1878, which makes it a criminal offence to suppress the finding of treasure. The punishment may extend to imprisonment for one year, and power is given to inflict a fine as well. The proceedings before the Magistrate resulted in the discharge of the appellant. Thereupon the respondent filed an application for revision of the order of discharge, but this was also dismissed. The appellant then filed the suit out of which this appeal arises claiming Rs. 3,100 as damages for malicious prosecution.

The criminal proceedings having ended in the discharge of the appellant he is entitled to succeed in his suit if he can show that the proceedings were instituted maliciously and in the absence of reasonable and probable cause. The learned District Judge has not considered the question of malice or of the want of reasonable and probable cause. As I have indicated he came to the conclusion that Ex. B (referred to in the judgment wrongly as Ex. C) did not amount to a complaint or a petition justifying criminal proceedings and dismissed the suit. The learned District Judge would appear to have overlooked definition of "complaint" in S. 4 of the Criminal Procedure Code. The definition is as follows:—

"'Complaint' means the allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown has committed an offence, but it does not include the report of a police officer."

The intention of the respondent in filing Ex. B, was to induce the Sub-Divisional Magistrate to charge the appellant with an offence under the Indian Treasure Trove Act, 1878. It had the desired effect and therefore it is impossible to say that the respondent did not institute or cause criminal proceedings to be opened against the appellant.

The appeal succeeds and the case will be remanded to the trial Court to decide the issues framed with regard to malice,

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want of reasonable and probable cause and damages. The appellant is entitled to his costs of the appeal and also to the refund of the court-fee. The costs in the lower Court will be made costs in the cause.

Appeal allowed and case remanded.

K. C.

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice,* MR. JUSTICE MOCKETT AND MR. JUSTICE ABDUR RAHMAN.

In the matter of an Advocate, Madras.*

F.B.

In the matter of an Advocate.

Legal Practitioner—Improper conduct—Filing of insufficiently stamped appeal on last day of limitation—Propriety.

The filing of a Memorandum of Appeal by a legal practitioner on the last day of limitation knowing full well that it was under-stamped and hoping that the Court would be persuaded to accept the deficiency later is not in accordance with the high traditions of the legal profession.

The notice under S. 12 (3) of the Indian Bar Councils Act was issued to P., Advocate, Madras, calling upon him to show cause why he should not be dealt with under the disciplinary jurisdiction of the High Court, in that he, having been engaged by one Palaniswami Chettiar of Mudaliarpet, Pondicherry, in about July, 1934, to file an appeal in the High Court against the decree in O. S. No. 11 of 1929 on the file of the Court of the Subordinate Judge of Cuddalore, that he paid a sum of Rs. 175 for properly filing the said appeal, but that, he presented the memorandum of appeal, with a deficient court-fee of Rs. 50 only, that further, having filed the appeal with a deficient court-fee, he made his aforesaid client believe that the full court-fee of Rs. 142 had been paid thereon and that when the said memorandum of appeal was returned by the High Court for re-presentation with the proper court-fee, he took return thereof on or about 26th September, 1934, but did not re-present it in time, as it ought to have been done.

The Advocate-General (Sir A. Krishnaswami Aiyar) on behalf of the Crown.

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* 12th September, 1938.

F.B.

In the matter of an Advocate.

V. V. Srinivasa Aiyangar and *S. Panchapagesa Sastri* for Respondent.

T. S. Venkatesa Aiyar on behalf of the Bar Council.

The Court delivered the following

Leach, C.J.

JUDGMENTS.—*The Chief Justice*.—The respondent who is an Advocate of this Court was charged with professional misconduct on a complaint by one Palaniswami Chetty, who is now dead. There were three separate charges. The first charge was that the respondent was engaged in or about July, 1934, by the complainant to file an appeal in this Court and put in sufficient funds for filing it, but that he presented the memorandum of appeal with a court-fee stamp of only Rs. 50 whereas it should have been stamped with court-fee of Rs. 142. The second charge was that having filed the appeal with a deficient court-fee the respondent made the complainant believe that the full court-fee had been paid. The third charge was that when the memorandum of appeal was returned by this Court for re-presentation with the proper court-fee the respondent did not re-present it in time, as he ought to have done. The Bar Council Tribunal heard the evidence on behalf of the complainant and the respondent and has presented a report in which it accepts the respondent's version of the arrangement between him and the complainant, and finds that there has been no professional misconduct.

The complainant's case is this. On or about the 26th July, 1934, he saw the respondent with a view to filing an appeal from a decision of the Subordinate Judge of Cuddalore, and that on the 30th July, the respondent having accepted his instructions, he paid to the respondent a sum of Rs. 175 on account of costs of the appeal. It is common ground that the stamp and the process-fees required Rs. 169-9-0. The complainant says that the arrangement was that the court-fee was to be paid out of the Rs. 175. The respondent's case is that of the Rs. 175, Rs. 100 was to be kept by him on account of his fees, Rs. 50 to be spent on court-fee stamps and the balance utilised for other expenses. He says that as the complainant was not in a position to pay all that was required for court-fees and his fees it was arranged that the respondent should file the appeal, stamped to the extent of Rs. 50 only and the complainant should pay the balance when the Court discovered the deficiency in the court-fee.

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In this Court a memorandum of appeal is received by what is known as the Receiving section. The Officials in this department merely enter in a register the date of filing. The memorandum is then passed on to another department where the stamping is checked. If it is discovered that there is a deficiency in the stamping the matter is placed before the Deputy Registrar, who causes the memorandum to be returned to the advocate who filed it. The arrangement in this case was that the memorandum should be filed with a stamp of less than the proper value and that when the deficiency was discovered, the complainant should put the respondent in further funds so that the deficiency in the stamping could be rectified. This scheme depended for its success on the Court not discovering the true position. The memorandum of appeal was not returned to the respondent until the 26th September, 1934, that is nearly two months after it had been filed.

Subbaraya Chetti gave evidence in support of the allegation that the Rs. 175 was paid to the respondent for the purpose of filing the appeal and that the arrangement was that he should pay the court-fee out of this money. This evidence was not accepted and in rejecting it the tribunal relied on the evidence of Mr. V. S. Ramanujachariar an advocate practising at Cuddalore. According to Mr. Ramanujachariar the complainant told him after his interview with the respondent that only some portion of the court-fee had been paid and some portion of the advocate's fee. On hearing this he informed the complainant that there would be difficulty in obtaining an extension of time and advised the complainant to send the balance as soon as possible. The respondent states that when the complainant failed to send the money to make up the deficiency in the court-fee he wrote to him several times but the complainant took no notice of the letters. The complainant denies that he received any letter but it is quite clear that the respondent wrote to him. Ex. I is a post card which the respondent wrote to the complainant on the 15th November, 1934, and in it he referred to the fact that he had written to him on the 21st October, 1934, and on the 31st October, 1934, asking him to meet him at Tirupapuliyur on the 2nd November, 1934, to attend to the matter of re-presenting the appeal in Court. This post card, as the endorsement by the postal authorities shows, was refused by the complainant.

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Leach, C J.

We see no reason to take a different view of the evidence of Mr. Ramanujachariar especially as the respondent's case is strongly supported by Ex. I. We agree with the Tribunal that the charges against the respondent have not been substantiated and that the arrangement between him and the complainant was as stated by the respondent. At the same time it is obvious from the respondent's own evidence that the filing of the memorandum of appeal on the last day of limitation knowing full well that it was under-stamped and hoping that the Court would be persuaded to accept the deficiency later is certainly not in accordance with the high traditions of the profession to which he belongs. If the real facts did become known to the Court it is obvious that the Court would not allow the deficiency to be paid. Another advocate who had been approached to file the appeal on terms similar to the arrangement accepted by the respondent refused to file it and the respondent also should have refused to file it unless the full amount of the court-fee was first paid. We are not now considering whether this action of the respondent amounts to professional misconduct. That question is not before us. But this Court will not tolerate practices of this nature.

Before I conclude, I will refer to another matter, and that is the delay which has taken place in the presentation of the report. The order constituting the Tribunal was passed on the 25th April, 1936. The report was presented on the 27th July, 1938. Including the complainant and the respondent the total number of witnesses examined was seven and the examinations were not of a lengthy nature. The complainant was examined on the 10th December, 1936, Subbaraya Chetty on the 5th February, 1937, and another witness called by the complainant on the 23rd February, 1937. There was no further examination till the 19th August, 1937, when Mr. Ramanujachariar was examined, and the last witness was not examined until the 6th April of this year. There is no explanation of the delay. The Court trusts that in future these matters will be dealt with much more speedily. In fairness to the respondent a charge of this nature should not be hanging over his head for more than two years, as has been the case here. I hope that these remarks will have the effect they are intended to have.

Mockett, J.

Mockett, J.—I agree. I only wish to add a word with regard to one matter. My Lord the Chief Justice has pointed

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out the undesirability of the practitioners lending themselves to the practice of deliberately filing appeals under-stamped. I wish to emphasise one evil which must inevitably arise out of that practice and it is this. On the facts in this case there was no reason whatever why the appeal should not have been filed in time and with the correct court-fee. The result probably would have been that the advocate would have been asked to draft an affidavit setting out wholly false grounds known to him to be untrue for not putting the proper stamp fee, and experience unfortunately shows that statements are included in this class of affidavit which have no basis whatever. If the proper practice is followed, as I have no doubt it is by many members of the Bar (one advocate clearly would have nothing to do with the arrangement in this case) this danger of the Bar being asked deliberately to draft false affidavits will not arise.

Abdur Rahman, J.

Abdur Rahman, J.—I agree.

B. V. V. —— *Order made.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO.

Kesavan Nambudiri .. *Petitioner* (6th Defendant)*

v.

Lakshmi Varasyar and others .. *Respondents (Plaintiffs).*

Kesavan Nambudiri *v.* Lakshmi Varasyar.

Malabar Law—Promissory note by Karnavan—Representation of necessity made by senior anandravan—Presumption of necessity raised thereby—Partition—Debt therein treated as binding and allotted to executant and assenting anandravan—If ratification of the debt by members of tarwad.

A Karnavan of a Malabar tarwad (first defendant) executed certain promissory notes in favour of the plaintiff and it was found that the senior anandravan (second defendant) also represented to the creditor that the money was required for tarwad necessity. Subsequent to the execution of the note there was a partition in the family in and by which these debts were allotted to the share of the first and second defendants. It was found that at the partition these debts were disputed as not binding on the tarwad but the mediators allotted them to the executant karnavan and assenting senior anandravan, giving them some extra properties.

Held, that in the circumstances, by merely subscribing to the said deed of partition wherein the said debt is included as one of the family debts, it cannot be said that the other members ratified the debts as binding debts. But as the then senior anandravan made a representation to the creditor of necessity, there was *prima facie* a presumption of necessity in favour of the plaintiff and the burden is shifted on to the other members of the family to prove that there was no necessity.

* C. R. P. Nos. 599 to 601 of 1935. 9th May, 1938.

Kesavan Nambudiri v. Lakshmi Varasyar.

Petitions under S. 25 of Act IX of 1887, praying the High Court to revise the decrees of the Court of the District Munsiff of Palghat in S.C.S. Nos. 541 to 543 of 1934.

C. S. Swaminadhan and *D. H. Nambudripad* for Petitioner.

K. Kuttikrishna Menon and *C. Vasudeva Mannadiar* for Respondents.

The Court made the following

ORDER (1—10—1937).—These three revision petitions arise out of three suits instituted upon three promissory notes dated 23rd July, 1928, 23rd July, 1931, and 24th July, 1931, executed by one Kesavan Nambudiri, the first defendant in all the suits in favour of the plaintiffs in the respective suits. On the date of the execution of these notes, the first defendant was the karnavan and manager of the tarwad of the defendants in the suits though the promissory notes do not *ex facie* show that they were executed by him as such. The suit claim was resisted by defendants 3 to 6 on the ground that the debts were not incurred for family necessity. Subsequent to the execution of the last promissory note, there was a partition in the family in and by which the members became separate and the said partition is evidenced by the deed dated 1st November, 1932. This deed is relied on by the plaintiffs as evidence of ratification of the debts due to them by the contesting defendants. The learned District Munsiff accepted this contention and gave a decree in favour of the plaintiffs. In the course of his judgment he observed thus:

"It was conceded by the plaintiff's vakil himself that if he had to prove necessity in the suit, it must be admitted that there was not sufficient proof about it. But he takes his stand on the ratification of the debt in the partition deed, to which all the members of the tarwad are parties. Even though a debt is not contracted for tarwad necessities, the assent of all the members of the tarwad can render it binding on the tarwad, even in case the assent was given subsequent to the loan . . . . . In the partition deed, all the members of the defendants' illom have accepted the debts as those binding on the illom. Therefore the question whether the debt was contracted for illom necessities loses much of its importance."

This view of the learned District Munsiff on the facts of this case has been attacked by Mr. Swaminathan on behalf of the sixth defendant who has preferred the above revision petition. It is an accepted principle of law that a manager of a joint Hindu family or a karnavan of a Malabar tarwad is the accredited agent of the family or tarwad and he represents his

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family or tarwad in all transactions with the outside world. He has *prima facie* therefore the power to enter into contracts on behalf of the family and bind the members of the family. But there is no presumption that every contract entered into by a manager is on behalf of the family. Therefore in every case where a contract is entered into by a person who fulfills the position of a manager of a family, it must be established that the contract entered into by him was on behalf of the family. If the contract itself contains a description that it was entered into by him as manager it would be enough, but if the contract does not contain such a description, evidence will have to be given that it was entered into by him as such manager. A representation believed in by a creditor that a loan was required for a family purpose would be enough. Therefore, before the transaction entered into by a manager *eo nomini* can be fastened upon the other members, it is essential that the contract must have been entered into by him as manager. If the loan was for a necessary purpose there can be no question that the contract will bind the other members whether they assented to the transaction or not. If the loan was not for a necessary purpose, *prima facie*, the contract will not be binding on them. It is only in such circumstances the question arises under what circumstances the other members of the family can be rendered liable. Whether it is a case of a joint Hindu family or a case of a Malabar tarwad, even though the members of a family or tarwad, were not actual contracting parties to a loan entered into by a manager, still it is open to them to ratify and adopt it in cases where the contract was entered into by the manager, in his capacity as manager but not for a necessary family purpose. In my opinion, the question of ratification can only arise in such a case, and not in a case where the loan was entered into by him in a purely personal capacity. Therefore this distinction is to be borne in mind when ratification is sought to be availed of by a creditor by reason of a transaction entered into between the members of a family *inter se*. It has therefore to be considered what the facts in these cases are before the contesting defendants could be said to be bound by the doctrine of ratification. As explained by Lord Russell, C.J., in *Marsh* v. *Joseph*[1]:

1. (1897) 1 Ch. 213 at 246.

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"To constitute a binding adoption of acts *a priori* unauthorised these conditions must exist: (1) the acts must have been done for and in the name of the supposed principal, and (2) there must be full knowledge of what those acts were, or such an unqualified adoption that the inference may properly be drawn that the principal intended to take upon himself the responsibility for such acts, whatever they were."

The facts as disclosed from the evidence are that at the date of the partition the members of the family other than defendants 1 and 2 disputed the debts contracted severally by them among which were included the suit debts on the ground that they were not contracted for any valid family necessity and they declined to be bound by them. To secure family peace, it was suggested by the mediators who brought about the partition that more properties than what they would be legitimately entitled to pertaining to their several shares might be allotted to defendants 1 and 2 in consideration whereof they might discharge severally the debts incurred by them, and to this proposal all the members of the family seem to have given their assent, in other words, the arrangement appears to be more or less a gift or an assignment of some of the properties which the other members would have got as and for their share and the responsibility of discharging the debts incurred by defendants 1 and 2 was entirely upon them. In such circumstances, it cannot be said that the members of the family with full knowledge of the circumstances attending the loans took upon themselves the discharge of debts or adopted the said debts as family debts in order that they might be bound to the creditors. Nothing has been established in the evidence to show that the plaintiff was either misled by any act at any rate of the sixth defendant which induced him to believe that he adopted the debt in such a manner as to preclude him from denying its validity. I am not therefore inclined to agree with the learned District Munsiff that there has been a ratification of the debt sufficient in law to bind the sixth defendant by subscribing to the said deed of partition wherein the said debt is included as one of the family debts. If there was therefore no ratification of the debt by the sixth defendant, the burden of fastening the liability for the same is certainly on the plaintiff. He has to establish that the debt was contracted under such circumstances as to make it binding on him. As already stated, the learned District Munsiff has observed that it was conceded by the plaintiff's vakil himself that if the plaintiff had to prove

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necessity in the suit, it must be admitted that there was not sufficient proof about it; but in the circumstances of the case I would not be justified in deciding the case against the plaintiff on this occasion. The learned District Munsiff in his judgment has also observed that the plaintiffs believed the representations made to them by defendants 1 and 2 to the effect that the money was required for defraying the expenses of the marriage of a girl of the illom, at the same time adding that no independent enquiry was made by them. But under the law which governs the members of a Malabar tarwad, the concurrence of the seniormost Anandravan in a transaction of the karnavan raises a *prima facie* presumption of necessity—*vide* the observations of Varadachariar, J., in C. R. P. No. 1556 of 1935. The second defendant in this case is the senior Anandravan. If therefore he also signified his assent to the transaction, a presumption of necessity *prima facie* arises in favour of the plaintiff and the burden is shifted on to the other members of the family to prove that there was no valid family necessity. Mr. Swaminathan contended that there was no warrant for the observations of the learned District Munsiff that a representation was also made by the second defendant. He has taken me through the notes of evidence in the case. No doubt, there was no specific statement to the effect stated by the learned District Munsiff in the notes of evidence recorded by him, but I cannot say that the learned District Munsiff made that statement without the second defendant having stated to that effect. On a reading of the deposition, as recorded by the learned District Munsiff, one may infer that the second defendant was an assenting party to the transaction entered into between the first defendant and the plaintiff. As the relative rights of the parties having regard to the facts of the case have not been correctly appreciated by either the plaintiff or the defendants and evidence seems to have been given on an incorrect appreciation of such rights, I think it desirable to call for a revised finding on the question whether the suit debts were contracted for a valid family necessity. I accordingly call upon the learned District Muniff to submit his finding on that question. In dealing with this matter, he will keep in mind what I have already stated, namely, that there is a presumption of necessity in favour of the plaintiff and that the burden is shifted on to the sixth defendant for disproving the case of necessity. The sixth defendant

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will be given leave to adduce the necessary additional evidence and the plaintiffs will be at liberty to let in rebutting evidence. Time for the return of the finding is six weeks from the date of receipt of this order. Ten days for objections.

These Civil Revision Petitions coming on for final hearing after the return of the finding of the lower Court that the suit debts were contracted for valid family necessity, the Court delivered the following

JUDGMENT.—I accept the finding and dismiss these Civil Revision Petitions with costs.

S. V. V. ——— *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW.

Veerappa Moopan .. *Accused**

Veerappa Moopan *In re.*

Criminal Procedure Code (V of 1898), S. 195—Disobedience to orders of Magistrate—Prosecution for offences under Ss. 447 and 188, Penal Code—Same Magistrate trying case—Validity—Need for complaint.

The proceedings started with a complaint by the Police against a certain person for offences under Ss. 447 and 188, Indian Penal Code, in respect of a certain act which was said to have constituted disobedience of the orders of the Sub-Magistrate issued under S. 144, Criminal Procedure Code. It appeared that the very Sub-Magistrate whose orders were said to have been disobeyed by the accused tried the alleged offender, and there was no previous complaint by that Magistrate or by his superior, and the accused was tried and convicted by him.

Held, that there should have been no cognizance taken of the case without a proper complaint as enacted by S. 195, Criminal Procedure Code that in any case the Sub-Magistrate should not have heard and decided the case himself and that the proceedings should therefore be quashed.

Case referred for the orders of the High Court, under S. 438 of the Code of Criminal Procedure, by the District Magistrate of Trichinopoly in his letter, dated 6th October, 1938.

Accused not represented.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court made the following

ORDER.—This is a reference by the District Magistrate, Trichinopoly, recommending that the proceedings of the Sub-

* Crl. R. C. No. 772 of 1938. (Case Refd. No. 24 of 1938.) 19th January, 1939.

Veerappa Moopan, *In re.*

Magistrate, Turaiyur, in C. C. No. 245 of 1938 on his file may be quashed.

There is no doubt that the proceedings were wholly misconceived and ought to be quashed.

In brief, the proceedings started with a complaint by the police against a certain person for offences under Ss. 447 and 188, Indian Penal Code, in respect of a certain act which was said to have constituted disobedience of the orders of the Sub-Magistrate, issued under S. 144 of the Criminal Procedure Code. In other words, the very Sub-Magistrate whose orders are said to have been disobeyed by the accused tried the alleged offender, and there was no previous complaint by that Magistrate or by his superior; the accused was tried and convicted by the same Magistrate. Fortunately on certain grounds the Sub-Magistrate thought fit to make a reference to the Sub-Divisional Magistrate for taking action against the accused under S. 562, Criminal Procedure Code, and the illegality of the proceedings was discovered by the Sub-Divisional Magistrate to whom the reference was made. The illegality is in fact clear and was so to say, admitted by the Sub-Magistrate after it was pointed out to him. It is obvious that there should have been no cognizance taken of this case without a proper complaint as enacted by S. 195, Criminal Procedure Code, and in any case the Sub-Magistrate should not have heard and decided the case himself. He was disqualified from trying the case and he should have certainly not tried the case himself.

The proceedings before him are therefore quashed and his reference to the Sub-Divisional Magistrate after recording a finding that the accused is guilty under Ss. 447 and 188 is set aside. In view of the nature of the act alleged, it is unnecessary and inexpedient that there should be any further proceedings against the accused in this case.

B. V. V. ——— *Proceedings quashed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE MADHAVAN NAIR.

The Official Receiver, West Tanjore .. *Appellant** (*1st Defendant*)

v.

Samudravijayan Chettiar and others .. *Respondents* (*Plaintiff and Defendants*).

Official Receiver, West Tanjore *v.* Samudravijayan Chettiar.

Deed—Construction—Settlement deed—Entire clause to be considered—Absolute estate conferred on donees—Subsequent clause limiting absolute estate—Effect—Transfer of Property Act (IV of 1882), S. 11.

While the Court must examine the entire instrument in order to see what its effect is, the examination must be carried out in the light of S. 11 of the Transfer of Property Act, when the instrument is one transferring immovable property. If the examination discloses that the transferor has used words creating an absolute interest those words must be given effect to notwithstanding that later words are used which restrict the right of full ownership.

A deed of settlement provided as follows:—"On account of the affection I have towards my two grandsons and in consideration of the service that is being rendered by them to me and as only the said two persons are my heirs I have with all my heart and by means of this settlement deed given away this day the properties described in Schedule B to them with power to enjoy them with all rights. But from and out of the income from the said properties I shall during my life pay the Government kist and enjoy the balance left. Afterwards both of them shall divide off the said properties into two moities as they please and enjoy the same. After the death of the said two persons their respective heirs shall succeed thereto. Both of them shall enjoy the properties described in Schedule B without making any alienation thereof by way of gift, exchange, sale, etc. . . . ."

Held, that the donees acquired an absolute estate under the settlement deed subject to the condition that the donor should enjoy the income during her life, and that the words in the deed prohibiting the alienation should be disregarded.

Appeal against the decree of the Court of the Subordinate Judge of Kumbakonam in O. S. No. 28 of 1928.

K. S. Desikan for Appellant.

R. Sundaralingam and *K.R. Rangaswami Aiyangar* for Respondents.

The judgment of the Court was delivered by

The Chief Justice.—The appellant is the Official Receiver of West Tanjore district. He represents the estate of one Ramappa Chettiar, an insolvent. The suit out of which this appeal arises was filed by Ramappa's son, Samudravijayan, for Leach, C.J.

* Appeal No. 9 of 1934. 22nd March, 1938.

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Leach, C.J.

a declaration that his father has merely a life interest in certain immovable properties and for an injunction restraining the appellant from offering for sale more than the alleged life interest. He also sought a decree for partition of other properties. The properties in respect of which the plaintiff alleged his father has a life interest are described in Schedule A to the plaint and the properties in respect of which partition was sought in Schedules B and C. The suit succeeded so far as it concerned the properties described in Schedule A, but it was dismissed so far as it concerned the other properties. The appellant contends that the learned Subordinate Judge of Kumbakonam who tried the case was wrong in holding that Ramappa's interest in the A schedule properties was limited to a life estate. He maintains that Ramappa's interest was that of an absolute owner. The appeal is limited to this question.

The original owner of the properties was one K. S. Ramu Chettiar, who died in 1873, leaving a widow Marudevi Ammal, and an adopted son Samudravijayan. The adopted son died in 1897 leaving two sons, Ramappa (the father of the plaintiff) and Surendranath. They were the 38th and 39th defendants in the suit and are the 38th and 39th respondents in the appeal. Ramu Chettiar left a will under which properties set out in Schedule A were bequeathed to the widow, and it is common ground that she acquired an absolute interest in them. By a deed dated the 15th March, 1912, she gave these properties to Ramappa and Surendranath, and the dispute is with regard to the effect of this deed, the material portion of which reads as follows:—

"On account of the affection I have towards my grandsons aforesaid—(1) Ramappa Chettiar and (2) Surendranath Chettiar—and in consideration of the service that is being rendered by them to me, and as only the said two persons are my proper heirs, I have with all my heart and by means of this settlement deed given away this day the properties described in Schedule B hereof, to both of them aforesaid, with power to enjoy them with all rights. But from and out of the income from the said properties, I shall, during my life, pay the Government kist and enjoy the balance left. Afterwards both of them shall divide off the said properties into two moities as they please and enjoy the same. After the death of the said two persons, their (respective) heirs shall succeed thereto. Both of them, individuals numbers 1 and 2 shall enjoy the properties described in Schedule B aforesaid, without making any alienation thereof by way of gift, exchange, sale, etc.; the value of the nanja, punja, etc., and house described in Schedule B aforesaid is Rs. 16,000. To this effect I have with all my heart and *bona fide* executed this

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settlement deed. I have delivered two documents as title deeds hereto. This settlement deed shall remain with Surendranath Chettiar of you."

The appellant's case is that as the donor conveyed the suit properties "with power to enjoy them with all rights" she created an absolute title in the donees and any words which follow and are repugnant to an absolute title must be ignored. He relies on S. 11 of the Transfer of Property Act which states that where on a transfer of property, an interest therein is created absolutely in favour of any person, but the terms of the transfer direct that such interest shall be applied or enjoyed by him in a particular manner, he shall be entitled to receive and dispose of such interest as if there were no such direction. The respondent contends that the document must be looked at as a whole and says that when this is done it is apparent that the intention of the donor was to give to Ramappa and Surendranath merely a life interest in the properties. He points to S. 82 of the Succession Act and argues that if the meaning of any clause in a will is to be collected from the entire instrument the same principle must apply when the Court is interpreting a deed of gift.

While the Court must examine the entire instrument in order to see what its effect is the examination must be carried out in the light of S. 11 of the Transfer of Property Act when the instrument is one transferring immovable property. If the examination discloses that the transferor has used words creating an absolute interest these words must be given effect to, notwithstanding that later words are used which restrict the right of full ownership. In the present case the properties were conveyed to Ramappa and Surendranath on account of affection, in consideration of 'service' and, because they were the donor's only heirs, and the words "with power to enjoy them with all rights" can only imply full ownership. It is conceded by the respondent that if the instrument stopped there it would operate to create an absolute estate in the donees. This being so, it is arguable that by reason of S. 11 of the Transfer of Property Act anything which comes after should be ignored. The words of gift are, however, followed immediately by these words "But from and out of the income from the said properties I shall during my life pay the Government kist and enjoy the balance" and we consider that they must be read in conjunction with the words of gift. Reading the document in

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this way there is a conveyance to Ramappa and Surendranath absolutely, subject to the condition that the donor should enjoy the income during her life. In other words she reserved to herself a life interest. This is emphasised by the words which come next:—

"Afterwards both of them shall divide off the said properties into two moieties as they please and enjoy the same."

"Afterwards" means after the donor's death, and on this event the properties are to be divided equally between the two donees without any restriction. The respondent would have it that the provision against alienation which comes later means that the donees were only to have a life interest. It appears to us that this provision was inserted in order to prevent the donees selling the property during the donor's life time as the sale would deprive her of the income. Be that as it may, the words prohibiting alienation must be disregarded because they limit the absolute estate which the donor conveyed to the donees with effect from her death. I should mention that the donor died in 1918, and as the result of partition agreements between Ramappa and Surendranath the properties covered by the deed were allotted to Ramappa.

In *Bhaidas Shivdas* v. *Bai Gulab*[1], the Judicial Committee had to consider a will left by a Hindu, who appointed his wife his executrix, constituted her the owner of his property and provided that she should leave whatever might remain after her death to her two daughters "as she liked". By cl. 18 of the will he directed his widow to defray the expenses of a religious object out of the rents of the property left to her, and authorised her to apply the surplus income for the maintenance of herself and her daughters. She was given an express power to mortgage or sell and by another clause the daughters were to be the executrices upon her death with power to deal with and manage the entire property. Their Lordships held that the widow took an absolute estate. The limitations which followed were not sufficient to displace the effect of the clause which constituted her the absolute owner of the property. In *Saraju Bala Debi* v. *Jyotirmoyee Debi*[2], which was also decided by the Privy Council a Hindu executed three documents, whereby he conveyed to his daughter, her sons, and their sons successively

1. (1921) 42 M.L.J. 385: L.R. 49 I.A. 1: I.L.R. 46 Bom. 153 (P.C.).
2. (1931) 61 M.L.J. 501: L.R. 58 I.A. 270: I.L.R. 59 Cal. 142 (P.C.).

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and her daughters immovable properties subject to a fixed rent with the right to transfer by sale or gift under certain conditions. The conditions were:—(1) the properties were not to pass to the heirs of the grantee's daughters; (2) they were not to be transferred by gift except to a limited extent for religious purposes; and (3) the grantor and his heirs were to have a right of pre-emption in certain circumstances. The Privy Council held that the grantee took an absolute estate. Their Lordships examined the conditions and held that they were to be disregarded as being repugnant restrictions. That is the position here. There is no doubt that it was the intention of the donor to convey the properties to Ramappa and Surendranath absolutely and the instrument was worded to give effect to this intention. Therefore the restriction on alienation must be ignored. For the reasons indicated we are of the opinion that the learned trial Judge was wrong in holding that Ramappa had merely a life interest, and we allow this appeal.

The learned Advocate for the appellant has also contended that the suit was bad as notice had not been given in accordance with S. 80 of the Code of Civil Procedure. In view of our decision on the main question in the appeal it is not necessary to decide whether the suit was properly instituted.

The plaintiff-respondent will pay the appellant's costs in this Court and in the Court below. The plaintiff-respondent will also pay to the appellant the court-fee which the appellant had to pay as the result of the suit having been filed *in forma pauperis*.

B.V.V. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW.

Perumal Reddiar .. *Petitioner** (*Accused*).

Perumal Reddiar, *In re.*

Madras Forest Act (XVI of 1927), S. 26, rr. 13 and 15—Digging in unreserved land—Removal of sand and stone—Removal bona fide *for agricultural use—No infringement of r. 13—Conviction for offence wrong.*

Where the petitioner (accused) quarried sand and stone from an unreserved public track and the offence charged against him was one punishable under rr. 13 and 15 of the rules framed under S. 26, Madras Forest Act,

Held, since in any case the offence charged against the petitioner having been for quarrying itself and not for non-payment of seigniorage fee, and the

* Crl. R. C. No. 528 of 1938. (Crl. R. P. No. 499 of 1938). 5th January, 1939.

Perumal Reddiar, *In re.*

evidence having established that there was no infringement of r. 13, the conviction could not be upheld.

Digging pits in a public cart track may be punishable in other ways, but it cannot amount to an infringement of r. 13

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Joint Magistrate, Ramnad, in C. A. No. 21 of 1938 preferred against the judgment of the Court of the Stationary Sub-Magistrate, Srivilliputtur in C. C. No. 934 of 1937.

T. S. Vaidhyanatha Aiyar for Petitioner.

K. Venkataraghavachari for *The Public Prosecutor* for the Crown.

The Court made the following

ORDER.—The petitioner was convicted of an offence punishable under rr. 13 and 15 of the rules framed under S. 26 of the Madras Forest Act, namely, illicit quarrying of sand and stone from a public cart track and his conviction was upheld in appeal by the Joint Magistrate of Ramnad who laid stress on the fact that the quarrying was in a public path or track though it has little bearing on the character of the offence. R. 15 merely provides a penalty in respect of breaches of the preceding rules and in this particular case the rule which is said to have been infringed is r. 13 which relates to quarrying on reserved and unreserved lands. In the present case the place where the quarrying took place is unreserved land and the rule does not make any difference between places where quarrying is unobjectionable and places where quarrying is objectionable. It does not prohibit quarrying in one place and allow it in another place. The first part of the rule declares the State's right to mines and minerals, the second part of the rule relates to reserved lands, the third part relates to unreserved lands and the fourth and last part gives information as to the authority to whom applications for permission to quarry in cases where the privilege of free quarrying is not allowed by the rules should be made. It is the third sub-rule of r. 13 that applies to the present case. It runs as follows:—

"In unreserved lands quarrying will be left absolutely free to the general public for *bona fide* agricultural or domestic use and to departments of Government, local boards and municipalities for *bona fide* public purposes and not for sale or commercial profit and with the previous sanction of Government in each case to other public bodies (whether the minerals have a

commercial value or not), subject to the proviso that quarries of any particular importance and value containing gravel, etc., may be closed against the general public and reserved for the use of Government departments or public bodies. Where a local body desires that the Executive right of quarrying on any such lands should be reserved for it, the lands will as a rule be leased to the local body concerned subject to the payment of the ordinary assessment. Quarrying by private persons for other than *bona fide* agricultural or domestic purposes will be charged with seigniorage fees."

From this it will be seen that there is no distinction made between quarrying in one locality and quarrying in some other locality. The only exception made by this rule is quarrying of gravel, etc. It is not the case that the quarrying by the petitioner was of gravel, etc. What was quarried was sand and stone of the ordinary kind and it is not pretended that they have any particular commercial value and the seigniorage fee charged when they are required for other than domestic or agricultural purposes is only six pies for cart as stated by the Tahsildar in his evidence. In this particular case, though it was sought to be made out by the prosecution that as much as 250 cart loads of material had been quarried by the petitioner, the evidence does not really establish that all this quantity was removed by him. This figure was arrived at as the result of an estimate made long after the removal by examining the pits found in the locality. But the evidence shows that quarrying was being done by a number of people at various times and it cannot be said that all the material that was taken away from the places where pits now exist was taken away by the petitioner alone. Even otherwise the evidence shows that the material removed by the petitioner was used by him for enclosing his land by ridges. The learned Joint Magistrate observes that he is unable to see how this can be regarded as *bona fide* agricultural purpose. Obviously the enclosing of land with ridges must be regarded as a *bona fide* agricultural purpose. R. 13 (*iii*) itself provides that in unreserved lands quarrying is absolutely free to the general public for *bona fide* agricultural or domestic use and this is a case in which the quarrying must be held to have been for *bona fide* agricultural use. Even otherwise the rule itself does not actually prohibit quarrying for other than agricultural or domestic use by the general public; it only makes such quarrying subject to payment of seigniorage fee and it is not the case here that seigniorage fee was demanded and not paid. In any case the offence charged against the petitioner was not non-payment of seigniorage fee, it is the

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quarrying itself which is alleged to be an offence. The evidence makes it clear that in this case there was no infringement of r. 13; the conviction is therefore not consonant with the evidence in the case. In the circumstances it is unnecessary for me to consider the other objection raised on behalf of the petitioner, namely, that the prosecution in this case was not with the sanction of the Revenue Divisional Officer as required by the order of Government regulating the procedure in the matter of prosecution of forest offences, the substance of which is printed at pages 465, etc., of the Forest Manual, 1931 Edition. The conviction proceeds on the wrong basis that the quarrying was not for a *bona fide* agricultural purpose and that the quarrying was from an objectional place, that is, a public cart track. The fact that the removal was from a public cart track has really nothing to do with the question whether such removal is an offence or not. Digging pits in a public cart track may be punishable in other ways, but it cannot amount to an infringement of r. 13. The conviction and the sentence imposed on the petitioner are therefore set aside and he is acquitted. The fine, if paid, must be refunded to the petitioner.

K. C. ——— *Conviction set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VARADACHARIAR AND MR. JUSTICE PANDRANG ROW.

A. Vijiaraghavalu Naidu (died) and others .. *Appellants* (Plaintiff's L.R.)*

v.

R. M. A. R. Rm. Arunachalam Chettiar and others .. *Respondents (Defendants).*

Vijiaraghavalu Naidu *v.* Arunachalam Chettiar.

Mortgage—Mortgagee insolvent—Official Receiver selling mortgage to another—Purchase price paid but no sale-deed executed before a suit on mortgage became barred—Suit on mortgage without registering sale-deed—Sale-deed executed later—Official Receiver not a party to suit—Suit if maintainable—Transfer of Property Act—Statutory charge holder under S. 55 (6) of the Act—If a transferee contemplated by S. 134.

A executed a mortgage on 14th December, 1914, in favour of *N*. The said *N* became an insolvent in 1924 and the Official Receiver purported to sell *N's* property including this mortgage and the plaintiff purchased them on 19th March, 1929, and paid the price as well on the same day. The sale was sanctioned on 17th April, 1929, but for some reason no sale-deed was executed till

*Appeal No. 51 of 1934. 22nd September, 1938.

30th April, 1930. As the mortgage had fixed a period of three years for payment, the mortgage would have become barred by 14th December, 1929 and therefore the purchaser instituted a suit on the mortgage on that day but did not make the Official Receiver a party to the suit. Vijiaraghavalu Naidu *v.* Arunachalam Chettiar.

Held, the plaintiff had no right to maintain the suit in the absence of a registered deed of transfer nor could he rely on the analogy of a sub-mortgagee in the circumstances of the case as the Official Receiver had not been impleaded as a party to this suit. The fact that a formal sale-deed had subsequently been executed cannot be used to get over this difficulty as by the date of the sale-deed, a suit on the mortgage was barred.

A person entitled to a statutory charge under S. 55 (6) cannot be placed on the same footing as a 'transferee' under S. 134 of the Transfer of Property Act.

Appeal against the decree of the Court of the Subordinate Judge of Kumbakonam in O. S. No. 38 of 1930.

A. V. Narayanaswami Aiyar for Appellants.

C. S. Venkatachariar and *D. Ramaswami Aiyangar* for Respondents.

The judgment of the Court was delivered by

Varadachariar, J.—The original appellant sued for the recovery of a sum of money alleged to be due under a mortgage deed Ex. A, executed by the first defendant in favour of one Narayana Chettiar on 14th December, 1914. Narayana Chettiar became insolvent in 1924. The Official Receiver in whom the assets of Narayana Chettiar vested purported to sell by auction several items of the insolvent's property including the claim under the suit mortgage and the plaintiff purchased them on 19th March, 1929. The plaintiff purchased the items thus sold for a sum of Rs. 1,010 which was paid on 19th March, 1929, itself. The sale appears to have been sanctioned by Court on 17th April, 1929, but for some reason or other a formal sale-deed was not executed till 30th April, 1930. The mortgage deed fixed a period of three years for payment and the twelve years under Art. 132 of the Limitation Act would thus have expired on 14th December, 1929. The appellant was accordingly obliged to institute this suit on 14th December, 1929, even though no sale-deed in his favour had by that time been executed by the Official Receiver. Though the mortgage purported to be for Rs. 15,000 the plaint stated that only a sum of Rs. 5,500 had been advanced under the document and it claimed to recover that amount with interest, limiting the total claim to Rs. 10,000. Varadachariar, J.

The plaint was at one stage rejected by the lower Court but later on it was restored. After this restoration, the first defen-

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Varadachariar, J.

dant filed a written statement raising various pleas of fact and questions of law. On the facts, he contended that the mortgage deed was nominal and no money had been received by him under that deed. As a point of law, he contended that the plaintiff had no right to maintain the suit in the absence of a registered sale-deed. He also contended that the restoration of the suit after the plaint had once been rejected was invalid, as the Court had no power so to restore and the only remedy of the plaintiff was to appeal against the rejection of the plaint.

On the evidence, the learned Subordinate Judge was of opinion that the mortgage deed was supported by consideration only to the extent of Rs. 1,000 but as the Judge decided the questions of law against the plaintiff he dismissed the suit. Hence this appeal.

Dealing with the questions of law, we do not think it necessary to express any opinion on the validity or otherwise of the order restoring the plaint to file because we have come to the conclusion that the plaintiff must fail on the ground that he had no right to maintain the suit. In the lower Court, it appears to have been contended that the plaintiff could in some sense be regarded as an assignee of the mortgage right and entitled to sue as such, even in the absence of a registered deed of transfer. This contention is obviously untenable (see *Fanny Skinner* v. *Bank of Upper India, Ltd.*[1]), and has rightly not been persisted in before us. The learned counsel for the appellant tried to sustain the suit on a different ground. He contended that as his client had paid Rs. 1,010 on 19th March, 1929, he was under S. 55 (6) of the Transfer of Property Act entitled to a lien or charge for that amount on the properties agreed to be sold by the Official Receiver and he argued that as the holder of such a lien or charge, the plaintiff stood in the same position as a sub-mortgagee who was entitled to sue not merely his mortgagor but even the original mortgagor. To this line of argument various objections have been taken on behalf of the respondents. It has first been contended that this new basis of claim should not be permitted to be advanced at all because it will change the nature of the case. In support of that contention reliance was placed upon *Mahesha Mal* v. *Gopal*[2]. It was

1. (1935) 69 M.L.J. 158: L.R. 62 I.A. 115: I.L.R. 57 All. 314 (P.C.).
2. (1933) I.L.R. 14 Lah. 640.

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next contended that S. 55 (6) of the Transfer of Property Act has no application to the facts of this case at all, because the contract to sell has not fallen through but has admittedly been carried out, though subsequent to the institution of the suit. It was also contended that the question of fact as to who was the party in default will have to be investigated before S. 55 (6) of the Transfer of Property Act could be invoked and that it was too late for the plaintiff to ask for this question being now investigated. It was finally contended that even if the plaintiff could be regarded as entitled to rely upon this line of argument, the analogy of a sub-mortgagee cannot help the plaintiff in the circumstances of the present case, having regard to the frame of the suit. As we are of opinion that this last contention must succeed, we do not express any views on the other objections.

An extreme contention was urged on behalf of the respondent that a sub-mortgagee had no right to sue the original mortgagor at all and reliance was placed in support of this contention on *Maung Po Hla* v. *Ma Ngwe Sin*[1]. It must however be stated that there are several decisions of this and other High Courts taking a different view (*Muthu Vijia Raghunatha Ramachandra Vacha Mahali Thurai* v. *Venkatachallam Chetti*[2], *Ramasami Pillai* v. *Muthu Chetti*[3], *Muthukrishnier* v. *Veeraraghava Aiyar*[4], *Kanhai Lal* v. *Mahadeo Prasad*[5], *Vellayan Chettiar* v. *Mahalinga Pathan*[6] and *Bansi Lal Bhagat* v. *Durga Prasad*[7]). Without pausing to examine how far the reasoning of the Rangoon judgment is consistent with this line of authority, it seems to us sufficient to point out that the learned Judges of the Rangoon High Court have lost sight of form No. 11 in Appendix D to the Civil Procedure Code which clearly contemplates a suit by a sub-mortgagee in which he can ask for relief by way of sale of the property comprised in the original mortgage. While we are therefore prepared to hold that a sub-mortgagee may maintain a suit against the original mortgagor, there are difficulties in the frame of the present suit which make it impossible for us to give relief to the plaintiff on this basis.

1. A.I.R. 1937 Rang. 56.
2. (1896) 6 M.L.J. 235: I.L.R. 20 Mad. 35 at 38.
3. (1910) I.L.R. 34 Mad. 53.
4. (1912) 25 M.L.J. 356: I.L.R. 38 Mad. 297 (F.B.).
5. (1912) 18 I.C. 389.
6. (1938) 1 M.L.J. 171.
7. (1908) 9 C.L.J. 429.

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At the outset we have to observe that the Official Receiver who for the purposes of this argument must be regarded as plaintiff's mortgagor, has not been impleaded as a party to this suit. It has been argued by the learned Counsel for the appellant that he would at best be a *pro forma* party and not a necessary party and that though in the interests of justice the plaintiff could have asked for his being impleaded even at a later stage, such a step had become unnecessary by reason of the fact that on 30th April, 1930, the Official Receiver had executed a formal sale-deed in favour of the plaintiff himself. This line of argument ignores the nature of the relief which a sub-mortgagee is entitled to claim as against the original mortgagor. The several clauses in Form No. 11 of Appendix D to the Code clearly show that what is contemplated in the suit there dealt with is that for the purpose of realising the amount due under the sub-mortgage, the sub-mortgagee may ask the Court to bring the original mortgaged property to sale and the balance of sale proceeds that may remain after satisfying the amount due under the sub-mortgage will be paid to the original mortgagee. For this purpose, it is necessary that an account should be taken not merely in respect of what is due under the original mortgage but also in respect of what is due under the sub-mortgage. The form also contemplates an opportunity for the original mortgagee to pay up the amount due to the sub-mortgagee plaintiff. These indications do not justify the contention that even in the absence of the original mortgagee, a sub-mortgagee can in some sense seek to represent the original mortgagee and claim to recover the whole amount due under the original mortgage, leaving it as a separate question to be decided between himself and the original mortgagee as to how much each of them is entitled to out of the original mortgage amount. In other circumstances, part of the difficulty that has arisen in the present case could have been avoided by reason of the sale-deed, Ex. G, but it so happened that that sale-deed was executed several months after the expiry of the twelve years period, with the result that on that date the Official Receiver as representing the original mortgagee could not have claimed payment to himself of the original mortgage amount. The plaintiff could stand in no better position so far as the rights derived under the sale-deed Ex. G are concerned.

If, in the suit as originally instituted, he is to be regarded only as in the position of a sub-mortgagee, he could have claimed only the amount advanced by him, in respect of which the law gives him a charge and not the amount due under the original mortgage. It is only for the purpose of realising the amount due to him under that charge that he could have sought the aid of the Court to bring the mortgaged property to sale to the extent necessary to satisfy his own charge on this basis. The plaintiff is also met by other insuperable difficulties arising from the frame of the suit. It seems to us futile to ask the Court to settle the amount due on foot of the sub-mortgage in the absence of the sub-mortgagor. The further difficulty in this case is that the plaintiff has recovered some amounts out of some of the items purchased by him but the parties are not agreed as to the amount realised by the plaintiff from out of the other properties included in the sale in his favour. If, from out of the other items, the plaintiff had realised more than what was due to him for the Rs. 1,010 and interest thereon, he obviously could not maintain the suit as nothing would then be due to him under the sub-mortgage. Again, the sale in his favour covers a large number of items and the charge under S. 55 (6) will attach to all those items. No reference has been made to those items in this suit and the plaintiff as a charge-holder will not be justified in throwing the whole charge upon one item of property covered by the charge. In view of these considerations we do not think any useful purpose will be served by permitting the appellant's learned counsel to put forward the new line of argument that he attempted to advance before us.

With reference to the authorities relied on by him, we may also point out that some of them related to mortgages of promissory note debts and proceeded on the analogy of S. 134 of the Transfer of Property Act. It would be difficult in the present case to apply the principle of those cases because on the date of suit, the plaintiff can in no sense be regarded as a "transferee". The utmost that he could claim was a statutory charge under S. 55 (6) and it does not seem to us right to place a person possessing such a charge on the same footing as a "transferee"—contemplated by S. 134 of the Transfer of Property Act.

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The appeal must accordingly be dismissed on the ground that the plaintiff had no right to maintain the suit. In this view, it is unnecessary to deal with the question of the quantum of consideration raised in the lower Court. The appeal is accordingly dismissed with costs—one set, to be equally distributed between 1 and 4 respondents

S. V. V. ——— *Appeal dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice,* MR. JUSTICE WADSWORTH AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

The Panchayat Board, Thiruvothiyur by its President, Balasubramania Mudaliar .. *Appellant* (Defendant)*

v.

The Western India Matches Company by Agent Henrik Hybbidnettee .. *Respondent (Plaintiff).*

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Madras Local Boards Act (XIV of 1920 as amended by Act XI of 1930), S. 75—Absence of valid notification under S. 75 by the District Board or Government—Levy of tax—Legality—S. 102-A (1)—Effect—Suit for refund of tax alleged to have been illegally collected—S. 225—Limitation under—If applicable—Statutes—Consistent interpretation by Courts in a particular way—Change—If to be effected by Court or Legislature.

The plaintiff's factory was outside the limits of the jurisdiction of the defendant Panchayat Board until 27th July, 1931, when by notification of Government under S. 5 (2) of the Local Boards Act it was included in the Panchayat Board's limits. The plaintiff was assessed to house-tax and education tax for 1931-1932, allowing a remission for the first half year under S. 102-A (1). The taxes were paid under protest on 4th November, 1931, 21st November, 1931, and 18th December, 1931. The present suit was filed on 14th March, 1933, to recover the taxes which the plaintiff had been compelled to pay. The suit was based on the ground that the taxes were illegal because there had been no notification under S. 75 (1) by the District Board resolving to levy house-tax in the area and the Government had not by notification sanctioned the levy of any tax. The defendant relied on S. 102-A (1) as a taxing section and also contended that the suit was barred by limitation under S. 225 of the Local Boards Act.

Held (by the division bench Burn and Lakshmana Rao, JJ.), taxing statutes must be construed strictly and S. 102-A (1) can only mean that "if the tax is otherwise leviable", the owner of a house included within a village is entitled to a remission under that section. It cannot imply that the tax is leviable. The tax is not leviable in the absence of a valid notification under S. 75 by the District Board or by the Government covering the area of the

* S. A. No. 301 of 1936. 15th December, 1938.

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plaintiff's factory and the levy of the tax was therefore illegal. The question of the applicability of S. 225 to the case was referred to the Full Bench.

Held, by the Full Bench, where the Courts have consistently interpreted the law in a particular way for many years it is for the legislature and not the Courts to effect a change, if a change is desirable. S. 225 of the Madras Local Boards Act is limited to suits for compensation or damages and the present suit is not barred by limitation.

Case-law reviewed.

Pothuru Swami Babu v. *Union Board of Narasannapeta*, (1933) 65 M.L.J. 725, overruled.

Appeal against the decree of the Court of the Subordinate Judge of Chingleput in A.S. No. 97 of 1934 preferred against the decree of the Court of the District Munsif of Poonamallee in O.S. No. 144 of 1933.

T. R. Venkatarama Sastri for *S.G. Satagopa Mudaliar* for Appellant.

C. Krishnaswamy instructed by *King and Partridge* for Respondent.

The Court (*Burn* and *Lakshmana Rao, JJ.*) made the following

ORDER OF REFERENCE TO A FULL BENCH.

The judgment* of the Court was delivered by

Burn, J.

Burn, J.—This is an appeal from the decree of the learned Subordinate Judge of Chingleput in A.S. No. 97 of 1934 on appeal from the District Munsif of Poonamallee. The facts are simple and are not in dispute. The plaintiff in O.S. No. 144 of 1933 in the District Munsif's Court was the Western India Matches Company. The company has a factory in the village of Ernavur. This factory until the 27th July, 1931, was outside the limits of the jurisdiction of the Thiruvothiyur Panchayat Board. On the 27th July, 1931, it was included within the Panchayat Board's limits by a notification of Government under S. 5 (2) of the Local Boards Act. Thereupon the Panchayat Board levied house-tax and education tax on the company for the year 1931-32 allowing a remission on half the full tax for the first half year under S. 102-A (1) (*b*). The company paid Rs. 858-3-9 for the first half year on the 4th November, 1931, Rs. 1,716-7-6 for the second half year on the 21st November, 1931 and Rs. 13-13-0 for a tiffin shed on the 18th December, 1931. These payments were made under protest and on the 14th March, 1933, the Match Company filed the suit against the Panchayat Board for refund of these

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amounts with costs. The suit was decreed by the District Munsif and his decision was confirmed on appeal by the learned Subordinate Judge. This second appeal has been preferred by the Panchayat Board.

The case for the plaintiff company was that the levy and collection of these taxes was illegal and *ultra vires*. Their case was based on two main grounds, firstly, that the site upon which the match factory stands is not within the limits of any area within which the District Board prior to the 1st April, 1930, had resolved to levy house-tax under S. 75 (1) of the Local Boards Act and, secondly, the Panchayat Board had made no recommendation to the Local Government under S. 75 (2) of the Act and the Local Government had not by notification sanctioned the levy of any tax. The defendant's case on the other hand was that the District Board long prior to the 1st April, 1930, had by resolution levied the tax within the limits of the Union Board of Thiruvothiyur; by the notification of the Local Government dated the 27th July, 1931, the company's factory became included within those limits, and therefore became taxable. Secondly, the Panchayat Board contended that the suit was barred by limitation because it had not been brought within six months of the date of collection as required by S. 225 (2) of the Local Boards Act.

Both the lower Courts have overruled the defendant's contentions and, in so far as the legality of the levy is concerned, we think there is no doubt but that both the lower Courts have decided rightly. It is not disputed that the site upon which the factory stands is not within the limits of any area covered by any resolution of the District Board prior to the 1st April, 1930. Now under S. 77 (1) (*a*) of the Local Boards Act any resolution of a District Board determining to levy any tax or toll under sub-S. (1) of S. 75 or under S. 76 shall specify the *local limits of the area* in which, the rate at which, the date from which and the period of levy, if any, for which, such tax or toll shall be levied. It is common ground that the resolution of the District Board levying this tax applied to the area controlled by the Union Board of Thiruvothiyur. The resolution of the District Board has not been filed in the case but it is clear that under S. 77 (1) (*a*) it must have specified the local limits of that area and the factory was undoubtedly outside those local limits.

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The Panchayat Board relies on S. 102-A (1) of the Local Boards Act and contends that as soon as the area of the village controlled by the Thiruvothiyur Panchayat Board was extended by the Government Notification of the 27th July, 1931, so as to include the site of the match factory, the match factory thereby became taxable. S. 102-A (1) is as follows:

"If any area is included within a village the owner of every house in such area shall,—

(a) if the date of such inclusion falls within the last two months of a half year, not be liable to pay any house-tax in respect thereof for that half-year; and

(b) if such date falls within the first four months of a half-year, be entitled to a remission of so much not exceeding a half of the house-tax payable in respect thereof for that half-year as is proportionate to the number of days in that half-year preceding such date."

As to this the respondent's contention is that this is not a taxing section, but a *remitting* section, and we think that this contention is clearly correct. The learned counsel for the appellant Board can only argue that since S. 102-A (1) provides for remission it is necessarily implied that but for this section the tax would be leviable for the whole half-year in which any area is included within the village. But, as the learned District Munsif has pointed out, taxing statutes must be construed strictly and we can only read S. 102-A (1) as meaning that, *if the tax is otherwise leviable*, the owner of a house included within a village is entitled to a remission under that section. We cannot read it as implying that tax is leviable. We think it is clear that tax is not leviable in the absence of a valid notification either by the District Board or by the Government and, as no such notification has ever been issued covering the area of the plaintiff's factory, we agree with the lower Courts that the levy of the tax was illegal.

The other question, whether the suit was barred by limitation is much more difficult. As already mentioned, the suit was filed on the 14th March, 1933, whereas all the amounts for the recovery of which the suit was filed had been collected by the 18th December, 1931. S. 225 (1) of the Local Boards Act provides that no suit or other legal proceeding shall be brought against any Local Board, or the president or any member, officer, or servant thereof, or against any persons acting under the direction of such Board, president, member, officer or servant in respect of any act done or purporting to be done in

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execution or intended execution of this Act . . . . . . until the expiration of two months next after notice in writing, stating the cause of action, the nature of the relief sought, the amount of compensation, claimed . . . . has been left at the office of the Local Board; and sub-S. (2) of the same section says that every such proceeding shall, unless it is a proceeding for the recovery of immovable property or for a declaration of title thereto, be commenced within six months after the date on which the cause of action arose or in case of a continuing injury or damage, during such continuance or within six months after the ceasing thereof. The Panchayat Board's contention therefore is that this suit, having been filed more than a year after the collection of the amounts claimed, is barred by limitation under S. 225 (2). The lower Courts have found against this contention relying upon the decision of Mr. Justice Madhavan Nair in *Lakshmanan Chetti* v. *Union Board of Devakottah*[1]. In that case our learned brother Madhavan Nair held expressly that S. 225 of the Local Boards Act is applicable only to suits for compensation and for damages, and that a suit for a declaration that the Union Board is not entitled to levy profession tax and for the recovery of the tax so collected, is not a suit for compensation and for damages and therefore does not require notice under the section. S. 225 (2) refers explicitly to suits covered by S. 225 (1) and it will therefore follow that the special period of limitation provided by S. 225 (2) does not apply to a such suit as this. This decision was followed by Mr. Justice Sundaram Chetti in the *Taluk Board of Devakottah* v. *Chockalingam Chettiar*[2]. The appellant Board on the other hand relies upon the decision of Mr. Justice Krishnan Pandalai in *Pothuru Swami Babu* v. *Union Board of Narasannapeta*[3], in which the learned Judge held that a suit for refund of house-tax collected from the plaintiff by the Union Board, on the ground that the requisite notice prescribed by the Act was not published and therefore the levy was illegal, falls within the scope of S. 225 of the Local Boards Act and is barred by limitation, if brought more than six months after the date of the cause of action. Mr. Justice Krishnan Pandalai dissented from the view taken by our learned brethren Madhavan Nair and Sundaram Chetti.

1. (1931) 60 M.L.J. 600. 2. (1932) M.W.N. 1089.
3. (1933) 65 M.L.J. 725.

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These are the only decisions that have been quoted to us which deal expressly with the point before us, but there are other decision of Benches of this Court which, in our opinion, render it necessary to have this question referred for decision by a Full Bench. In *Syed Ameer Sahib* v. *Venkataramal*[1], Muttuswami Aiyar and Wilkinson, JJ., expressed the view that S. 156 of the Local Boards Act of 1884 was not applicable to a suit in ejectment against the Local Board. Strictly speaking this opinion was *obiter*, since the learned Judges decided the appeal on the ground that the Taluk Board ought to have been sued and not the President of it. But the learned Judges quoted with approval an observation by Garth, C. J., in *Chunder Sikhur Bundopadhya* v. *Obhoy Churn Bagchi*[2], that the section is only applicable to suits for compensation claimed for wrongful acts committed under colour of the Act. This observation was followed by Sir Arthur Collins, C.J. and Parker, J., in *President of the Taluk Board, Sivaganga* v. *Narayana Chetti*[3], where the learned Judges said:

"We do not think S. 156, Madras Act V of 1884, applies. The cases contemplated in that section are suits for compensation and for damages, and the principle is to allow public bodies time for tender of amends to the parties as to avoid litigation,"

and the learned Judges then referred to *Chunder Sikhur Bundopadhya* v. *Obhoy Churn Bagchi*[2], and other cases. They decided therefore that previous notice under S. 156 was not necessary in a case where a suit was filed for an injunction against the President of a Local Board. The same principle was applied by Muttuswami Aiyar and Parker, JJ., in *Srinivasa Pillai* v. *Ratnasabapathi Pillai*[4]. That was a case under S. 261 of the District Municipalities Act the wording of which was for the present purpose the same as that of S. 156 of the Local Boards Act. These cases were considered by a Full Bench of this Court in *Govinda Pillai* v. *Taluk Board, Kumbakonam*[5]. That case was decided in 1908 and by that time S. 156 of the Local Boards Act had been amended and expanded. The Full Bench held that notice of action was not necessary under S. 156 (1) of the Local Boards Act when the suit was for an injunction and that the six months' limitation

1. (1892) I.L.R. 16 Mad. 296.
2. (1880) I.L.R. 6 Cal. 8 (F.B.).
3. (1892) 3 M.L.J. 13: I.L.R. 16 Mad. 317.
4. (1892) 3 M.L.J. 124: I.L.R. 16 Mad. 474.
5. (1908) 19 M.L.J. 333: I.L.R. 32 Mad. 371 (F.B.).

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prescribed by S. 156 (3) did not apply to such a suit. Sir Arnold White, C.J., who pronounced the opinion of the Full Bench referred to the case of *President of the Taluk Board, Sivaganga* v. *Narayana Chetti*1. He pointed out that in S. 156, by an amendment introduced in 1890, it was provided that a person giving notice under S. 156 (1) of the Local Boards Act must state 'the nature of the relief sought, the amount of compensation claimed.' The learned Chief Justice considered that these words had been introduced in order to make it clear that the Legislature recognised and accepted the rule of law laid down in the authorities to which he had previously referred, the rule of law being that the cases contemplated by S. 156 (1) were suits for compensation and for damages, and the principle to allow public bodies time for tender of amends to the parties as to avoid litigation." Madhavan Nair, J., in *Lakshmanan Chetti* v. *Union Board of Devakottah*2, relies strongly upon this Full Bench decision, but the learned Advocate for the appellant points out that Madhavan Nair, J., does not refer in his judgment to S. 225 (3) of the Local Boards Act as it stood in 1920. S. 225 (3) of the Act of 1920 had apparently been introduced by the amending Act of 1890. It states:

"No action such as is described in sub-S. (1) shall, unless it is an action for the recovery of immovable property or for a declaration of title thereto, be commenced otherwise than within six months next after the accrual of the cause of action."

Learned counsel's contention is that the wording of this section shows that S. 225 (1) was meant by the Legislature to apply to all actions that might be brought against the Local Board on account of any act done or purporting to be done in pursuance or execution or intended execution of the Act. Otherwise it is difficult to assign any meaning or purpose to the words 'unless it is an action for the recovery of immovable property or for a declaration of title thereto." There is considerable force in this contention and indeed this argument seems to have commended itself to the learned Chief Justice in *Govinda Pillai* v. *Taluk Board, Kumbakonam*3. On page 376 the learned Chief Justice observes as follows:—

"The explanation of the words 'unless it is an action for the recovery of immovable property, or for a declaration of title thereto' in sub-S. (3)

1. (1892) 3 M.L.J. 13: I.L.R. 16 Mad. 317.
2. (1931) 60 M.L.J. 600.
3. (1908) 19 M.L.J. 333: I.L.R. 32 Mad. 371 (F.B.).

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would seem to be that when the section was amended the Legislature was prepared to accept the view taken by the Bombay High Court in *Nagusha* v. *Municipality of Sholapur*[1], decided in 1892, namely, that a suit in ejectment fell within the provisions of the corresponding enactment of the Bombay Act."

Pinhey, J., also said that in his view these words had been introduced into sub-S. (3) in order to exclude such actions, namely, actions for the recovery of immovable property or for declarations of title thereto from the scope of sub-S. (3) in case the Madras High Court should follow the decision in *Nagusha* v. *Municipality of Sholapur*1. These observations would indicate that the intention of the Legislature, in the opinion of those learned Judges, was that all kinds of actions were meant to be included in S. 225 (1).

Prima facie it seems to us clear that an action for the recovery of house-tax alleged to have been illegally levied by a Local Board is a suit in respect of an act done or purporting to be done in execution of the Local Boards Act. We think there is force in the contention raised on behalf of the appellant that these words in S. 225 (1) must be read literally. Learned Counsel has pointed out that their Lordships of the Privy Council have on several occasions laid it down that statutes passed by the legislatures of this country must be read according to the plain meaning of their words. With all respect to our learned brother, Madhavan Nair, we think that the observations of their Lordships of the Privy Council in *Bhagchand Dagadusa* v. *Secretary of State for India*[2], have a considerable bearing on this case. The same argument receives added force from the observations of their Lordships of the Privy Council in the case of *Commissioners for the Port of Calcutta* v. *Corporation of Calcutta*[3], their Lordships point out the "pivotal importance" of the words "purporting or professing to act in pursuance of the statute." Their Lordships observe that:

"Even work which is not done in pursuance of the statute may nevertheless be accorded its protection if the work professes or purports to be done in pursuance of the statute."

It is difficult, we think, to hold that the Panchayat Board in levying these taxes on the respondent was not purporting to act in execution of the Local Boards Act.

1. (1892) I.L.R. 18 Bom. 19.
2. (1927) 53 M.L.J. 81 : I.L.R. 51 Bom. 725 (P.C.).
3. (1937) 2 M.L.J. 594 at 601 (P.C.).

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We think it is therefore desirable that the view expressed by the several Benches of this Court to the effect that S. 225 (formerly 156) of the Local Boards Act covers only suits for compensation and for damages should be reconsidered. We therefore decide to refer to a Full Bench the question whether suits against a Local Board for refund of house-tax alleged to have been illegally collected come within S. 225 (1) and (2) of the Local Boards Act.

In pursuance of the above Order of Reference, the Court (The Chief Justice, Wadsworth and Krishnaswami Aiyangar, JJ.) expressed the following

Leach, C.J.

OPINION.* *The Chief Justice.*—In 1931 the village of Ernavur was added to the jurisdiction of the Panchayat Board of Thiruvothiyur. The respondent company has a match factory in Ernavur and when the village came within the jurisdiction of the Panchayat Board the factory buildings were assessed to house-tax the amount of the tax collected being Rs. 2,588-8-3. The respondent company challenged the validity of the action of the Panchayat Board and filed a suit in the Court of the District Munsif of Poonamallee to recover what it had been compelled to pay. The District Munsif held that the tax had been illegally levied and rejected the contention of the Panchayat Board that the suit did not lie because it had not been filed within the period allowed by S. 225 of the Madras Local Boards Act, 1920, as amended by Act XI of 1930. The District Munsif considered that the period of limitation imposed by that section only applied to suits for compensation or damages. The Subordinate Judge of Chingleput upheld the decision of the District Munsif on both points on appeal. The Panchayat Board then filed a second appeal to this Court. The appeal was heard by Burn and Lakshmana Rao, JJ., who agreed that the levy was illegal, but referred to a Full Bench the question whether S. 225 of the Madras Local Boards Act, 1920, is confined to suits for compensation or damages. This Bench has been constituted to decide the question.

A long series of decisions, with one exception, support the decisions of the lower Courts on the question of the applicability of S. 225. I shall refer to certain of these decisions presently, but before doing so it is necessary to set out the history

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of the section and that of the corresponding section in the Madras District Municipalities Act, 1920. Most of the decisions have been under earlier Acts. The first Act relating to Local Boards was the Madras Local Boards Act, 1884, in which S. 156 was the corresponding section to S. 225 of the present Act. S. 156 of the Act of 1884 read as follows:—

"No action shall be brought against any Local Board, or any of their officers, or any person acting under their direction, for anything done or purporting to be done under this Act until the expiration of one month next after notice in writing shall have been delivered or left at the office of the Local Board, or at any place of abode of such person, explicitly stating the cause of action, and the name and place of abode of the intended plaintiff and unless such notice be proved, the Court shall find for the defendant, and every such action shall be commenced within six months next after the accrual of the cause of action, and not afterwards; and if any person to whom any such notice of action is given shall, before action brought, tender sufficient amends to the plaintiff, such plaintiff shall not recover more than the amount so tendered, and shall pay all costs incurred by the defendant after such tender."

The Act of 1884 was amended by Act VI of 1900 and S. 156 was amended to read as follows:—

"(1) No action shall be brought against any Local Board or Panchayat or against any member or servant of such board or panchayat or against any person acting under the directions of such local board or panchayat or of a member or servant of such board or panchayat, on account of any act done, or purporting to be done, in pursuance or execution or intended execution of this Act, or in respect of any alleged neglect or default in the execution of this Act until the expiration of one month next after notice in writing shall have been delivered or left either at the office of the Local Board or Panchayat or at the place of abode of such member or servant or of such person, explicitly stating the cause of action, the nature of the relief sought, the amount of compensation claimed and the name and place of abode of the intended plaintiff; and unless such notice be proved to have been so delivered or left, the Court shall find for the defendant.

(2) If the Local Board or Panchayat member or servant or other person to whom notice is given as provided in sub-S. (1) shall, before action is commenced, tender sufficient amends to the plaintiff, such plaintiff shall not recover more than the amount so tendered. The plaintiff shall also pay all costs incurred by the defendant after such tender.

(3) No action such as is described in sub-S. (1) shall, unless it is an action for the recovery of immovable property or for a declaration of title thereto, be commenced otherwise than within six months next after the accrual of the cause of action.

(4) No action shall be brought against the President of a Local Board or Chairman of a Panchayat on account of any act done in pursuance or execution or intended execution of this Act, or in respect of any alleged default on his part in the execution of this Act, if such act was done or if such default was made in good faith; but any such action shall, so far as it is maintainable in a Court, be brought against the Local Board except when brought

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by the Local Board or the Secretary of State for India in Council under S. 157 on account of anything done by the President or Chairman himself."

The next Act was the Madras Local Boards Act, 1920, in which S. 156 of the former Act became S. 225. The new section followed the lines of S. 156 of the Act of 1900, except that the period of notice was extended from one to two months. There was another amending Act in 1930, but so far as the present question is concerned it made no substantial alteration to the section as it stood in the Act of 1920. In all the Acts since the Act of 1884 the section required the statutory notice to state the amount of compensation claimed.

In the Madras District Municipalities Act, 1884, the corresponding section to S. 156 of the Madras Local Boards Act of that year was S. 261 and the wording was identical. The Madras District Municipalities Act of 1884 was amended by the Madras District Municipalities Amendment Act, 1897 and S. 261 was one of the sections amended. The amendment was to the same effect as the amendment made in the Madras Local Boards Act, 1884, by the amending Act of 1900. In 1920 District Municipalities became governed by the Madras District Municipalities Act of that year and S. 350 which replaced S. 261 expressly limited the necessity of notice and the period of limitation to suits for damages or compensation and this is how the Madras District Municipalities Act now stands.

The earliest decisions of this Court relating to the question under discussion were given in 1893. There were three decisions in that year, two with reference to the Madras Local Boards Act, 1884, and one with regard to the Madras District Municipalities Act of that year. In *Syed Ameer Sahib* v. *Venkataramal*[1], Muttuswami Aiyar and Wilkinson, JJ., gave it as their opinion that S. 156 of the Act only related to suits for compensation for wrongful acts committed under colour of the Act, and in the *President of the Taluk Board, Sivaganga* v. *Narayana Chetti*[2], Collins, C. J. and Parker, J., expressly held that the cases contemplated by the section were suits for compensation or damages, the principle being to allow public bodies time for tender of amends to the parties so as to avoid litigation. In *Srinivasa Pillai* v. *Ratnasabapathi Pillai*[3], Muttuswami Aiyar and Parker,

1. (1892) I.L.R. 16 Mad. 296.
2. (1892) 3 M.L.J. 13: I.L.R. 16 Mad. 317.
3. (1892) 3 M.L.J. 124: I.L.R. 16 Mad. 474.

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JJ., held that a suit to recover a forfeited deposit of a contractor was outside the scope of the section, and concurred in the opinion that the section applied only to suits for compensation or damages.

Under the Madras Local Boards Act of 1900 there was one decision—*Govinda Pillai* v. *Taluk Board, Kumbakonam*[1]— and under the District Municipalities Act as amended in 1897 two decisions—*Mahamahopadhyaya Rangachariar* v. *Municipal Council, Kumbakonam*[2] and the *Municipal Council of Kumbakonam* v. *Veeraperumal Padayachi*[3]. The judgments in these cases followed the earlier decisions. It is necessary to refer only to the first of these cases which was decided by a Full Bench consisting of White, C. J., Sankaran Nair and Pinhey, JJ. White, C. J., observed that the explanation of the words "unless it is an action for the recovery of immovable property or for a declaration of title thereto" in sub-S. (3) of the Act of 1897 would seem to be that when the section was amended the Legislature was prepared to accept the view taken by the Bombay High Court in *Nagusha* v. *Municipality of Sholapur*[4] to the effect that a suit in ejectment fell within the provisions of the corresponding enactment of the Bombay Act. The judgment went on to point out that the decision in the last mentioned case was overruled by a Full Bench of the Bombay High Court in *Manohar Ganesh Tambekar* v. *Dakor Municipality*[5] and this Court in *Syed Ali Saheb* v. *Chairman of the Salem Municipality*[6] took the same view. 'In my opinion the explanation for the insertion of the words "unless it is an action for the recovery of immovable property or for a declaration of title thereto" is that the Legislature had in mind the decision in *President of the Taluk Board, Sivaganga* v. *Narayana Chetti*[7], where it was said that the principle embodied in the section could not apply when the object of the suit was to obtain a declaration of title to immovable property and for an injunction to restrain interference with immovable property. It was not realised that the wording might be made the basis of an argument that the statutory notice was necessary for all suits other than those relating to immovable property.

1. (1908) 19 M.L.J. 333: I.L.R. 32 Mad. 371 (F.B.).
2. (1906) 16 M.L.J. 582: I.L.R. 29 Mad 539.
3. (1914) 28 M.L.J. 147.
4. (1892) I.L.R. 18 Bom. 19.
5. (1896) I.L.R. 22 Bom. 289 (F.B.).
6. (1893) 3 M.L.J. 223.
7. (1892) 3 M.L.J. 13: I.L.R. 16 Mad 317.

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In *Municipal Council, Dindigul* v. *Bombay Company, Limited, Madras*[1], Coutts-Trotter, C. J. and Madhavan Nair, J., gave a decision which is directly in point here. This was a suit filed against the Municipal Council of Dindigul for the recovery of a sum wrongfully collected by the Municipality as tax. It was held that such an action was essentially an action for "money had and received" and the bar of limitation prescribed by S. 350, cl. (2) of the Madras District Municipalities Act of 1920 would not apply. There are three decisions relating to suits for recovery of profession tax said to have been wrongfully levied: *Krishna Jute and Cotton Mills Company, Ltd., Ellore* v. *Municipal Council, Visianagaram*[2], *Lakshmanan Chetti* v. *Union Board of Devakottah*[3] and the *Taluk Board of Devakottah* v. *V. S. R. M. Chockalingam Chettiar*[4]. In all these cases it was held that the suit was outside the section. In *Lakshmanan Chetti* v. *Union Board of Devakottah*[3], Madhavan Nair, J., after a careful review of the authorities accepted the opinion already prevailing and held that S. 225 of the Madras Local Boards Act, 1920, was applicable only to suits for compensation or damages.

The only judgment which runs counter to these decisions is that of Krishnan Pandalai, J., in *Pothuru Swamy Babu* v. *Union Board, Narasannapeta*[5], where it was held that a suit for refund of house-tax collected on the ground that the levy was illegal fell within the scope of S. 225 of the Local Boards Act as it now stands. The learned Judge considered that observations in the judgment in *Govinda Pillai* v. *Taluk Board, Kumbakonam*[6], left him free to decide the question untrammelled by authority and he formed the opinion that to exclude a suit of this nature from the section would be to defeat the object for which it was framed. I do not consider that the judgment in *Govinda Pillai* v. *Taluk Board, Kumbakonam*[6], left it open to the learned Judge to disregard the other decisions of the Court and I am unable to accept his decision as embodying a correct statement of the law.

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1. (1928) 56 M.L.J. 525: I.L.R. 52 Mad. 207.
2. (1925) 49 M.L.J. 542.
3. (1931) 60 M.L.J. 600.
4. (1932) M.W.N. 1089.
5. (1933) 65 M.L.J. 725.
6. (1908) 19 M.L.J. 333: I.L.R. 32 Mad. 371 (F.B.).

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It is not necessary to examine the decisions given by other Courts. Reference to the principal decisions elsewhere is to be found in the judgment of Madhavan Nair, J., in *Lakshmanan Chetti* v. *Union Board of Devakottah*[1] and all that need be said here is that they do not throw doubt on the decisions of this Court.

Where the Courts have consistently interpreted the law in a particular way for many years it is for the Legislature and not for the Court to effect a change, if a change is desirable. As I have indicated S. 225 of the Madras Local Boards Act stands substantially as it was in 1900. Since 1900 there have been two amending Acts and numerous decisions of this Court interpreting the section in the same way; in fact an unbroken line but for the decision of Pandalai, J. In *Barras* v. *Aberdeen Steam Trawling and Fishing Co., Ltd.*[2], Viscount Buckmaster said:

"It has long been a well-established principle to be applied in the consideration of Acts of Parliament that where a word of doubtful meaning has received a clear judicial interpretation, the subsequent statute which incorporates the same word or the same phrase in a similar context, must be construed so that the word or phrase is interpreted according to the meaning that has previously been assigned to it?"

Viscount Buckmaster went on to quote the words of James, L.J., in Ex parte *Campbell*[3], where he observed:

"Where once certain words in an Act of Parliament have received a judicial construction in one of the superior Courts, and the Legislature has repeated them without alteration in a subsequent statute, I conceive that the Legislature must be taken to have used them according to the meaning which a Court of competent jurisdiction has given to them."

The last amendment having been made before the decision of Krishnan Pandalai, J., and this Court having repeatedly interpreted the section as applying only to suits for compensation or damages it must be taken that the Legislature intended it to be interpreted in this way. Moreover in the last amendment of the Madras District Municipalities Act the corresponding section was expressly limited to suits for compensation or damages. The Legislature could not have intended Local Boards to be in a different position to District Municipalities in this respect. If S. 225 of the Local Boards Act had been placed on the statute book for the first time in 1930 it might be open to the Court to come to another conclusion, but in the circumstances it can only be held that S. 225 of the Madras Local

1. (1931) 60 M.L.J. 600.
2. (1933) A.C. 402.
3. (1870) 5 Ch. 703.

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Boards Act is limited to suits for compensation or damages, and the question referred is answered in this sense.

The costs of the reference will be made costs in the appeal.

Wadsworth, J.—I agree.

Krishnaswami Aiyangar, J.—I agree.

This second appeal coming on for final hearing this 10th day of January, 1939, after the expression of the opinion of the Full Bench, the Court (*Burn* and *Lakshmana Rao, JJ.*) delivered the following

JUDGMENT.—The Full Bench having decided that the suit was not barred by limitation, this appeal must be and is hereby dismissed with costs.

K.S. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATASUBBA RAO AND MR. JUSTICE ABDUR RAHMAN.

Maharajah Rajasri Raja Saheb Meharbhan Dostan Raja Sri Rao Swethachalapathi Ramakrishna Rangarao Bahadur Varu, the Rajah of Bobbili Samasthanam, Bobbili .. *Appellant** (*1st Defendant*)

v.

Bommireddipalli Venkata Suryanarayana (deceased) and others .. *Respondents* (*Plaintiffs and Defendants 2 to 10 and Nil*).

Rajah of Bobbili v. Venkata Suryanarayana.

Evidence Act (I of 1872), S. 13 (b)—"Assertion"—Meaning—Verbal statement not accompanied by act—Previous judgments—Similar right asserted—Admissibility in evidence.

The word "assertion" in S. 13 (*b*) of the Evidence Act includes both a statement and enforcement by act. The evidence tendered under that section need not necessarily be evidence of acts done but a verbal statement not amounting to, and not accompanied by, any act would also be admissible if it amounted to a 'claim' Thus judgments in previous cases wherein a similar right was asserted, though not admissible as such, may be referred to as instances in which the right was claimed.

Woodroffe and Ameer Ali's Law of Evidence, 9th Ed., p. 178, relied on.

Appeal against the decree of the District Court of Vizagapatam in O. S. No. 1 of 1929.

V. Govindarajachari and *N. Vasudeva Rao* for Appellant.

* Appeal No. 110 of 1933. 7th April, 1938.

Rajah of Bobbili v. Venkata Suryanarayana.

Venkatasubba Rao, J.

The Government Pleader (*B. Sitarama Rao*) and *Ch. Raghava Rao* for Respondents.

The judgment of the Court was delivered by

Venkatasubba Rao, J.—We do not propose to call upon the respondents. The nature of the right which the first defendant possesses, is fully set out in *Secretary of State for India* v. *Maharajah of Bobbili*[1]. The question here is, whether the plaintiff has acquired as against the first defendant, the right of easement which he claims. The learned District Judge has fully considered the question and as we agree with his conclusion, it is unnecessary to deal with the matter in great detail. Mr. Govindarajachari for the appellant (the first defendant) has endeavoured to show that the District Judge was influenced by certain judgments in some previous cases, which are in law inadmissible. True, the District Judge has referred to and discussed those judgments in some detail but takes care to observe that in arriving at the finding, he considered the evidence irrespective of them. S. 167 of the Evidence Act provides that the improper admission of evidence shall not be ground of itself for a reversal of the decision in any case, if it appears to the appellate Court that independently of the inadmissible evidence, there was sufficient evidence to justify the decision of the Court below. The judgments referred to may not be admissible as such, but evidence of the alleged right is afforded under S. 13 (*b*) by instances in which the right was claimed by the plaintiff's father or its exercise was asserted by him. The word "assertion" occurring in this clause includes both a statement and enforcement by act. The evidence tendered under this section need not necessarily be evidence of acts done, but a verbal statement not amounting to, and not accompanied by, any act would also be admissible, if it amounted to a "claim" (see *Woodroffe and Ameer Ali's Law of Evidence, 9th Ed., page 178*). Then we have Ex. J, a letter written by the Village Munsif of Narayanapuram. In view of the circumstance which was the occasion for the letter, it is possible to argue that it is admissible under the second clause of S. 32 as containing the deceased's statement made "in the course of business." But it is unnecessary to consider this question as in any event, as has been conceded, it is relevant under the third clause, as a statement against the pecuniary or proprietary

1. (1919) 37 M.L.J. 724: L.R. 46 I.A. 302 : I.L.R. 43 Mad. 529 (P.C.).

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Venkata-subba Rao, J.

interest of the person who made it. As to its genuineness, there is more than sufficient proof, as it has been spoken to not only by the witnesses for the plaintiff but also for the defence. Great weight attaches also to Ex. A written by the Channel Superintendent, who has been examined as P.W. 1. It is of much corroborative value and materially supports the plaintiff's claim. There are several other documents which bear upon the case, to which we think it unnecessary to refer. We are prepared to concur in the lower Court's estimate of the evidence and to uphold its finding. The appeal accordingly fails and is dismissed with costs.

As to the memorandum of objections, it is not pressed except in regard to one minor matter. In the portion of the decree (*see* p. 19 of the pleadings paper) pertaining to the injunction that has been granted, the word "inhabitants", it is suggested, may be left out, and to this no objection is taken. That part of the decree may follow the wording of paragraph 6 (*b*) of the plaint. This is the only order that is necessary.

The respondents will pay the appellant's costs of the memorandum of objections.

The case having been posted to be spoken to this day the Court made the following Order (posted for being spoken to) :—

The 11th respondent, the Secretary of State, will bear his own costs of the appeal.

B. V. V. ——— *Appeal and Memo. of objections dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Mavila Kuniyedath Koran *alias* Kunhamboo Nambiar .. *Appellant* (Plaintiff)*

v.

Mavila Kuniyedath Govindan Nambiar (deceased) and others .. *Respondents (Defendants 4 to 6, 2, 3 and 7 to 11 and Nil).*

Koran v. Govindan Nambiar.

Malabar family—Sisters acquiring properties with funds provided by brother—Nature of the interest they have—Evidence to establish nature of interest.

Three sisters in a Malabar Marumakkathayam family acquired properties in their names with funds provided by their brother. Two of the sisters died

* S.A. No. 197 of 1934. 30th January, 1939.

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and the surviving sister and brother executed a gift deed in favour of the grandchildren of the surviving sister. The plaintiff, son of one of the deceased sisters, claimed the gifted properties. Both the lower Courts held that the funds having been provided by the brother, the interest created was in favour of the surviving sister by the deeds.

Held, that to say a tenancy-in-common could have been created by taking the documents of title for the various items separately in the names of one or the other of the three sisters would be a logical incongruity. To say that when a gift was put in the names of three sisters jointly there was a presumption that they took as joint tenants with rights of survivorship was to apply to Indian conditions an English rule of conveyancing which has been frequently held to be inapplicable. The inference therefore that there was no tenancy-in-common from the fact that the three sisters were made joint holders of property in the documents of title was wrong. At any rate the evidence should be sufficient to establish a joint tenancy with rights of survivorship.

Appeal against the decree of the Court of the Subordinate Judge of Tellicherry in A.S. No. 320 of 1931 preferred against the decree of the Court of the District Munsif of Cannanore in O.S. No. 610 of 1929.

P. Govinda Menon for Appellant.

K. Kuttikrishna Menon for Respondents.

The Court delivered the following

JUDGMENT.—The appeal raises the question of the nature of the interest conferred upon three sisters in a Malabar Marumakkathayam family by reason of the acquisition of properties in their name with funds which have been held to have been supplied by their brother Chandu.

The appellant is the plaintiff who is the son of one of the sisters who died in 1903. Another sister died childless in the same year. In 1918, the brother Chandu and the surviving sister executed a gift deed in favour of the grandchildren of the surviving sister now represented by defendants 4, 5 and 6. Both the Courts held that the funds by which these properties were acquired were the funds of the brother Chandu and that he intended to create a beneficial interest in favour of his sisters. The trial Court held that the three sisters took the property as tenants-in-common and that therefore the plaintiff was entitled to claim one-third share as heir of his mother. The learned Subordinate Judge evolved a theory which was quite inconsistent either with the plaintiff's theory that the sisters were tenants-in-common or the defendants' theory that the sisters were benamidars. He observes that the fact that the documents of title were taken in the joint names of the three sisters discloses that

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Chandu's intention was that these sisters should hold together either as joint tenants or as members of a *tavashi* with the incident of impartibility. "Any thing like a tenancy-in-common was far from the contemplation of Chandu." The learned Subordinate Judge observes:

> "If there had been any such intention, it would have been very easy to give effect to it by allowing the acquisitions to stand separately in the name of each of the three sisters."

These observations seem to me to involve an error of law and an error of logic. To say that a tenancy-in-common could have been created by taking the documents of title for the various items separately in the names of one or other of the three sisters seems to me to be a logical incongruity. To say that when a gift is put in the names of three sisters jointly, there is a presumption that they take as joint tenants with rights of survivorship is to apply to Indian conditions an English rule of conveyancing which has frequently been held to be inapplicable in India. It is unnecessary for me to enumerate the cases which have been cited before me on that subject. The law is clearly summarised in Mayne's Hindu Law (latest edition), page 903, where it is said that the principle of joint tenancy is unknown to Hindu Law except in the case of joint property of an undivided Hindu family and that the *prima facie* inference that a gift to undivided brothers makes them take as tenants-in-common can be displaced by express words or other sufficient indication making the estate granted a joint estate with rights of survivorship. But the learned Subordinate Judge after these observations does not proceed to infer that the transactions under consideration created a joint tenancy in favour of the three sisters only. What he does is to take into consideration subsequent dealings with another property acquired in the names of the three sisters contemporaneously with the acquisition of the suit properties and he comes to the conclusion that, because the brother and surviving sister dealt with this item of property on the assumption that no one besides themselves had any interest after the death of the two deceased sisters, the original intention when all these properties were acquired was to create a joint tenancy with rights of survivorship in favour not only of the three sisters but also of the brother with whose funds the properties were acquired. This conclusion seems to me to involve an inference that the three

sisters held the properties as to three-fourths of their value beneficially and as to one-fourth of their value as benamidars for their brother.

There are cases in which it has been held that a document may convey a beneficial title as to one item, while being a benami transfer as to another item included in the genuine deed in order to defeat creditors. But I am not aware of any decided case in which it has been held that persons in whose favour a single property has been transferred can take a beneficial interest in that property while at the same time constituting themselves benamidars in an undivided and unspecified share in favour of the person who provides the funds. It seems to me that the evidence in this case is not sufficient to establish a joint tenancy with rights of survivorship at all. Such a tenure is certainly a very unusual tenure to create by means of a gift to persons of the community to which the parties belong and it would, to my mind, require very clear and positive evidence of intention on the part of the donor to justify any such inference. But the learned Subordinate Judge has inferred a still more unusual tenure, that is to say, a joint tenancy with rights of survivorship between the three nominal owners and a fourth person to whom the deed passes no title. I find it difficult to imagine any legal process by which such a result could be reached. The inference is based upon Ex. XXII and the connected document, which could equally well be explained by the theory that all the three sisters were benamidars for their brother. I do not want to be understood to express any opinion on the question whether these properties were held by the sisters beneficially or as benamidars for their brother. But I do find that the learned Subordinate Judge was wrong in inferring that there was no tenancy-in-common from the fact that the three sisters were made joint holders of the property in the documents of title and that he has come to a conclusion regarding the title to these properties which is not only foreign to the pleadings, but is incompatible with the form of the deeds.

In this view, I allow the appeal and remand it to the District Judge, North Malabar for fresh disposal in the light of this judgment. Costs will abide by the result.

K.C. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE STODART.

Govindasami Chetti .. *Petitioner** (*Petitioner*).

Govindasami Chetti, *In re.*

Civil Procedure Code (V of 1908), O. 21, r. 90—Right to apply—Sale in execution of decree—Creditor attaching property subsequently—Application to set aside sale—Maintainability.

A mere creditor has not got the right to apply under O. 21, r. 90, Civil Procedure Code. And the fact that the creditor making the application has attached the property after the sale and pending confirmation does not give him any higher right.

Petition under S. 115 of Act V of 1908, praying the High Court to revise the order of the Court of the Subordinate Judge of Cuddalore dated 7th February, 1938, and made in C.M.A. No. 5 of 1937 (C.M.A. No. 47 of 1937, District Court, South Arcot), preferred against the order of the Court of the District Munsif of Cuddalore dated 19th August, 1937, and made in M.P.R. No. 2235 of 1935 in O.S. No. 212 of 1935, District Munsif's Court, Villupuram.

S. Panchapagesa Sastri and *K.R. Krishnaswami Aiyar* for Petitioner.

The Court delivered the following

JUDGMENT.—Property was sold in Court auction in execution of a decree. While this sale was pending confirmation this petitioner who also had a decree attached the same property. Then he put in this petition to set aside the sale under O. 21, r. 90 on the ground that there was irregularity in publishing or conducting it. The Courts below have held that the petitioner did not come within that rule as he was not a person whose interests were affected by the sale. This petition is to revise that finding.

The petitioner is not entitled to rateable distribution under S. 73 of the Code. His grievance is that the sale but for the irregularity would have fetched more in which case he could have gone against the surplus funds in Court after the executing decree-holder had been paid.

But the question remains, was the petitioner a person whose interests were affected by the sale?

Every creditor whether he has a decree or not is interested in seeing that at any sale of his debtor's property to another as much as possible is realised. The more the debtor receives for

* C.R.P. No. 604 of 1938. 19th January, 1939.

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his property the better he will be able to pay his debts. The questions for determination seem to be,

(*a*) Is this sufficient to give a creditor the right to apply under O. 21, r. 90?

(*b*) Does the fact that the creditor making the application has attached the property after the sale and pending confirmation give him any higher right?

Answering the first question I do not think a mere creditor can come in with an application under O. 21, r. 90. I have never seen that proposition enunciated nor has such a case ever come before me.

The answer to the second question is more difficult. Does the fact that the creditor has attached the property after the sale and before it is confirmed occupy any better position? Are his interests affected by the sale so as to enable him to apply under O. 21, r. 90? His interests in one sense are affected by the sale, namely, in the sense that if it is confirmed the attachment of the property made at his instance disappears; but he cannot complain of that, for his attachment from the beginning was a conditional attachment. When he attached the property he knew that his attachment would disappear if the sale was in the ordinary course confirmed and would enure only if the sale for some reason was set aside.

Can the petitioner then say:

"I can apply to have the sale set aside under O. 21, r. 90 because if I succeed my attachment will continue in full force and effect and I can have a new sale at my own instance which will bring in more money."

In other words can it be said that the interests of a person in petitioner's position are affected by the sale when the only possible way in which they are affected is not by the sale itself but by the success or failure of his petition. It seems to me that the criterion in such cases is whether the person damnified is damnified by the actual sale at the time of the sale and that nothing that the said person himself does after the sale can give him a higher right than he had at the time of the sale. At the time of the sale this petitioner had no *locus standi* to apply to have the sale set aside. I do not think the petitioner by attaching the property after the Court sale acquires any higher right than any other creditor. There is no direct authority for the petitioner's contention that a creditor effecting such an

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attachment is a person whose interests are affected by the sale so as to entitle him to come in with a petition under O. 21, r. 90. The petition is dismissed.

B.V.V. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE SOMAYYA.

C. R. Balanagayya Chetti .. *Petitioner* in all*

v.

Chetti Varadarajulu Chetti and others .. *Respondents.*

Balanagayya Chetti *v.* Varadarajulu Chetti.

Civil Procedure Code (V of 1908), O. 45, r. 4—Scope—Two different suits tried together—A common question existing in them—Permission for consolidating the suits—If can be granted.

Two different suits which had among others one question in common were tried together in the trial Court; but there were separate judgments. The appeals against them were heard together and dealt with in one judgment. An application was filed for consolidating the two appeals. The suits, if consolidated, would comply with the condition regarding the value.

Held, that the fact that there is a common question does not entitle the petitioner to an order for consolidation when there are other questions which are not common and the application does not come under O. 45, r. 4. Under O. 45, r. 4 the Court has got a discretion and is not bound to grant an order for consolidation.

Petitions praying that the High Court will be pleased to grant leave to the petitioner herein to appeal to His Majesty in Council against the decrees of the High Court dated 20th October, 1938 and passed in Appeals Nos. 288 and 275 of 1934 preferred against the decrees of the Court of the Subordinate Judge of Salem in O. S. Nos. 57 and 56 of 1933 respectively (O. S. No. 61 of 1929 and O. S. No. 25 of 1928 on the file of the District Court of Salem), etc.

T. R. Venkatarama Sastri and *B. V. Viswanatha Aiyar* for Petitioner.

A. Srirangachariar for Respondents.

The Court made the following

Leach, C.J.

ORDER. *The Chief Justice.*—We have before us two applications for certificates permitting appeals to His Majesty in Council and for an order consolidating the two appeals. The appeals were heard together and dealt with in one judgment. In the trial Court the suits were tried together, but there were separate judgments. The first suit was O.S. No. 56 of 1933 of the

* C.M. Ps. Nos. 5512, 5513 and 5514 of 1938. 8th February, 1939.

Bala-nagayya Chetti v. Varada-rajulu Chetti.

Leach, C.J.

Court of the Subordinate Judge, Salem, and was filed by the second respondent for the dissolution of a partnership with the petitioner and the taking of the partnership accounts. He valued his relief at Rs. 6,000. The petitioner denied that the partnership ever existed. The second suit was O. S. No. 57 of 1933 of the Court of the Subordinate Judge, Salem, and was filed by the petitioner against both respondents. The first respondent is the father of the second respondent. In this suit the petitioner alleged that he had paid to the respondents various sums of money with the direction that they should be paid to one Raja Hanumappa Chetti in discharge of his indebtedness to him. The petitioner said that the monies had not been paid over to his creditor according to his direction and that he had been compelled to pay twice over. On this footing the petitioner asked for a decree for Rs. 6,436-5-0 against the first respondent and a decree for Rs. 802-8-0 against the second respondent. The suits were entirely different, but there was a common question, namely, whether there had been a settlement of matters in dispute between the petitioner and the respondent. It was said that the disputes had been settled by a third party and that the terms of the settlement had been embodied in a letter marked as Ex. C. The Subordinate Judge held that there had been no settlement and dismissed the second respondent's suit, but in the petitioner's suit he found for the petitioner and granted him a decree for Rs. 7,924-4-4. The second respondent appealed to this Court in Appeal No. 275 of 1934 against the dismissal of his suit and both the respondents appealed in Appeal No. 288 of 1934 against the decree granted to the petitioner.

The judgment of this Court recognised that all the questions were not common to the two suits but allowed both the appeals on the ground that a settlement had in fact been arrived at. The petitioner contends that in these circumstances he is entitled to certificates permitting appeals to His Majesty in Council and an order consolidating the two appeals. O. 45, r. 4 of the Code of Civil Procedure states that for the purposes of pecuniary valuation, suits involving substantially the same questions for determination and decided by the same judgment may be consolidated; but suits decided by separate judgments shall not be consolidated, notwithstanding that they involve substantially the same questions for determination. Totalling

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the values placed on the respective claims the suits, if consolidated, would comply with the condition with regard to value, but this does not mean that the petitioner is entitled to certificates permitting him to appeal to the Privy Council. O. 45, r. 4 requires that the questions for determination in both suits shall substantially be the same. Now there is one common question, namely, the question with regard to the settlement, but there are other questions which are not common and if the question with regard to the settlement is answered in the way that it was answered by the Subordinate Judge it would involve the decision of the questions which are not common. The fact that there is a common question does not entitle a petitioner to an order for consolidation when there are other questions which are not common. The basis of an order for consolidation must be that the two suits involve substantially the same questions. This is not the position here. Moreover, the rule says that suits 'may' be consolidated. It does not say that they shall be consolidated. Therefore the Court is not bound to grant an order for consolidation. But apart from the question of discretion the present cases do not come within the rule, and this decides the matter.

The applications will be dismissed with costs in the first application (No. 5512 of 1938).

Memorandum of costs will follow.

K. C. —— *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE LAKSHMANA RAO.

Maliyakkal Imbichi's son Mannan .. *Appellant** (*Petitioner*)

v.

Chevakaran Keloth Puthiya Malikkayammal Mariyumma and others .. *Respondents* (*Respondents 2, 5, 6 and 4*).

Mannan v. Puthiya Malikkayammal Mariyumma.

Malabar Tenancy Act (XIV of 1930), Ss. 3 (o) and 20 (5)—Subsequent kanamdars—No attornment, to them by previous kuzhikanamdar — If kanamdars acquire the status of landlords—Benefit of S. 20 (5)—If can be claimed.

Where a jenmi granted a *kanam* subsequent to a *kuzhikanam* and the kuzhikanamdar did not attorn to the kanamdars,

Held, that the kanamdars were not landlords of the kuzhikanamdar within the meaning of S. 3 (o) of the Malabar Tenancy Act and could not claim the benefit of S. 20 (5) of the Act.

* S.A. No. 24 of 1937. 12th April, 1938.

Appeal against the decree of the District Court of North Malabar in Appeal Suit No. 127 of 1936 preferred against the order of the Court of the Additional District Munsiff of Tellicherry in O. P. No. 24 of 1935 in O. S. No. 121 of 1935.

Facts.—The appellant is a kuzhikanam tenant under the tarwad of the fourth respondent (legal representative of a jenmi). After the expiry of the lease term, the jenmi granted a melkanam to the first respondent and another whose legal representatives are respondents 2 and 3 in the High Court, with power to collect rent from the appellant. The kanam deed recited that all the rights of the jenmi were transferred to the kanamdars except the right of redemption after six years and the kanaris were authorised to evict the tenant and recover the properties from him and also to recover the whole rent from him.

The jenmi informed the appellant that he should pay the rent to these kanaris but the appellant had been paying rent to the jenmi. The kanamdars filed a suit on the strength of the kanam to recover arrears of rent from the tenant. Thereupon the tenant filed a petition for the renewal of the holding and prayed that he was entitled to get a renewal at a proper rent fixed by the Court with effect from the expiry of the prior term. The kanamdars contended that practically the whole of the rights of the jenmi had been assigned to them and the jenmi had only a bare right of redemption and by such assignment they had got the landlord's interest and they should be considered the immediate landlords under whom the appellant held the land. They further contended that the petition for renewal had not been filed *bona fide* and they wanted the property for their own use and they were not prepared to grant a renewal and hence the appellant was not entitled to get a renewal. The first Court held that the kanam deed was not an assignment deed and the appellant had not paid rent nor had he agreed to pay rent to the kanamdars and the appellant was not a tenant with reference to the kanamdars and the kanamdars could not be considered to be his landlords and they were not therefore entitled to say that they wanted the land for their own purposes. It was further held that the landlord under whom the appellant held and to whom he had paid rent was the jenmi, the predecessor in interest of the fourth respondent and as the fourth respondent had not claimed that he wanted the land for his own purposes, the appellant was entitled to get a renewal from his immediate landlord, the fourth respondent.

On appeal by the kanamdars, the lower appellate Court held that there was no absolute assignment in the case, the kanamdars for all practical purposes possessed all the rights of the jenmi,

Mannan v. Puthiya Malikkayammal Mariyumma.

including the right to claim possession under S. 20 (5) of the Malabar Tenancy Act and the kanamdars were the landlords and in the end dismissed the petition for renewal. The tenant filed a second appeal to the High Court.

M. Chinnappan Nair for Appellant.

M. C. Sridharan for Respondents.

The Court delivered the following

JUDGMENT.—This second appeal arises out of an application for renewal of a kuzhikanam under S. 22 of the Malabar Tenancy Act, and the sole question for determination is whether the respondents 1 to 3 can claim the benefit of cl. (5) of S. 20 of the Malabar Tenancy Act. The respondents are subsequent kanamdars from the jenmi and until the kuzhikanamdar attorns to them he cannot be said to hold the land under them. They would not therefore be landlords within the meaning of cl. (*o*) of S. 3 of the Malabar Tenancy Act though they may be entitled to collect the rent payable by the kuzhikanamdar, and the benefit under cl. 5 of S. 20 can only be claimed by the landlord of the kuzhikanamdar. It is, in this view, unnecessary to consider whether cl. 2 of S. 40 of the Act does not preclude the respondents from claiming the benefit of cl. (5) of S. 20 of the Act and the view of the District Judge that the kanamdars are in effect the proprietors of the land during the subsistence of the kanom is untenable. The decree of the District Judge is therefore set aside and that of the District Munsif is restored. Costs up to date will abide and follow the result.

K.C. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE LAKSHMANA RAO.

Ganapathi Asari .. *Petitioner* (Accused)*

v.

Kuppuswamy Asari .. *Respondent (Complainant).*

Ganapathi Asari v. Kuppuswamy Asari.

Criminal Procedure Code (V of 1898), S. 195 (1) (b)—False statement—Offence under S. 193, Penal Code—Complaint of different offence—Need for sanction of Court

Parties cannot be allowed to evade the provisions of S. 195 (1) (*b*) of the Criminal Procedure Code by filing a complaint under a provision other than S. 193, Indian Penal Code, where the offence falls under that section. Where a defamatory statement was made in the deposition of the witness in

* Crl. R.C. No. 711 of 1938. (Crl. R.P. No. 676 of 1938). 9th February, 1939.

Ganapathi Asari *v.* Kuppuswamy Asari.

a criminal case and the finding was that the statement in question was deliberately false,

Held, that the offence committed fell under S. 193, Indian Penal Code and that it could not be taken cognisance of without a complaint by the Court.

In re *Appadurai Nainar*, (1935) 69 M.L.J. 812: I.L.R. 59 Mad. 165, relied on.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of Session of North Arcot Division at Vellore in C. A. No. 37 of 1938 preferred against the judgment of the Court of the Sub-Divisional Magistrate of Thiruvannamalai in C.C. No. 39 of 1938.

V. Rajagopalachari for Petitioner.

K. S. Narayana Aiyangar for Respondent.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court made the following

ORDER.—The defamatory statement was made in the deposition of the petitioner as a witness in C. C. No. 193 of 1938 on the file of the Sub-Magistrate of Chengam and the finding is that the statement in question was deliberately false. The offence committed would therefore fall under S. 193 of the Indian Penal Code which cannot be taken cognizance of without a complaint by the Court and as laid down in *Appadurai Nainar*, In re,[1] parties cannot be allowed to evade the provisions of S. 195 (1) (*b*) of the Criminal Procedure Code by filing a complaint under another provision of the Indian Penal Code. The conviction and sentence of the petitioner under S. 500 of the Indian Penal Code are therefore set aside and the fine if levied will be refunded.

B.V.V. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE NEWSAM.

Balada Lakshminarayana Deo .. *Appellant** (*Plaintiff*)

v.

The Imperial Bank of India, Guntur .. *Respondent* (*Defendant*).

Lakshminarayana Deo *v.* Imperial Bank of India, Guntur.

Imperial Bank of India Act (XLVII of 1920), Sch. II, S. 50—Servant dismissed without notice—Whether proper.

A servant of the Imperial Bank of India does not hold his office at pleasure and is not liable to be dismissed without notice.

1. (1935) 69 M.L.J. 812: I.L.R. 59 Mad. 165.

* S. A. No. 465 of 1935. 22nd February, 1939.

Lakshmi-narayana Deo v. Imperial Bank of India, Guntur.

Servants even of a statutory body do not hold office at pleasure merely because the statute provides the body or person by whom they may be dismissed. It is not right to assume that the power of dismissal is a power of summary dismissal.

Chellam Aiyar v. *Corporation of Madras*, (1917) 6 L.W. 284, dissented from.

Venkateswara Aiyar v. *S. M. S. Devasthanam*, (1935) 69 M.L.J. 206, relied on.

Appeal against the decree of the District Court, Guntur, in Appeal Suit No. 128 of 1934 preferred against the decree of the Court of the District Munsif of Guntur in Original Suit No. 483 of 1932.

V. Rangachari for Appellant.

O. T. G. Nambiar for *King and Partridge* for Respondent.

The Court delivered the following

JUDGMENT.—I cannot agree with the view taken by both Courts below that a servant of the Imperial Bank of India holds his office at pleasure and is liable to be dismissed without notice.

The view is based on *Chellam Aiyar* v. *Corporation of Madras*[1], in which case provisions similar to S. 50 of Sch. II of the Imperial Bank of India Act were considered and interpreted in that light.

The decision along with others has been fully considered. In *Venkateswara Aiyar* v. *S. M. S. Devasthanam*[2], which I take as my authority for the true position, servants of the Crown hold office during the pleasure of the Crown—not by virtue of any special prerogative of the Crown but because such are the terms of their engagement (*Shanton* v. *Smith*[3]). But servants even of a statutory body do not hold office at pleasure merely because the statute provides the body or person by whom they may be dismissed. It is not right to *assume* that the power of dismissal is a power of summary dismissal.

Where no stipulation exists as to notice, a hired servant can be dismissed only on reasonable notice.

In my view this suit must be remanded (to the District Munsif, Guntur) for trial on Issues 1 and 2. Costs will abide the result. On Issue 4 I find that the Court has jurisdiction to entertain the suit. Court-fee paid on second appeal will be refunded.

Appeal allowed and suit remanded.

K. C.

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1. (1917) 6 L.W. 284.
2. (1935) 69 M.L.J. 206.
3. (1895) A.C. 229.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE LAKSHMANA RAO.

Villi Chinnu *alias* Kandan .. *Appellant** (*Accused—Prisoner*).

Villi Chinnu, *In re.*

Criminal Tribes Act (III of 1911), S. 23 (1) (b)—Reason to the contrary—Long interval of time—Repetition of offence—Enhanced punishment—Penal Code, 1860, Ss. 75, 380 and 457.

The long interval of time between the last conviction and the commission of the subsequent offence is a special reason to the contrary within the meaning of S. 23 (1) (*b*) of the Criminal Tribes Act and the Court may take that into account in awarding enhanced punishment for the subsequent offence.

In re *Karuppa Thevan*, (1929) 57 M.L.J. 743: I L.R. 53 Mad. 80, relied on.

Appeal against the order of the Assistant Sessions Judge of the Court of Session of the Chingleput Division in C. C. No. 28 of 1938 passed on 28th October, 1938.

Appellant not represented.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court delivered the following

JUDGMENT.—The appellant has been convicted under Ss. 457, 380 and 75, Indian Penal Code, and S. 23, cl. 1 (*b*) of the Criminal Tribes Act and sentenced to the minimum punishment of rigorous imprisonment for seven years under S. 457, Indian Penal Code, and S. 23, cl. 1 (*b*) of the Criminal Tribes Act. He has also been sentenced to rigorous imprisonment for five years under Ss. 380 and 75 of the Indian Penal Code, and the sentences have been directed to run concurrently.

There was house-breaking by night and theft in the building of P.W. 1 on the night of 15th August, 1938, and the evidence is that the appellant was caught red-handed. The conviction under Ss. 457 and 380 of the Indian Penal Code is therefore right and the appellant admitted his previous convictions. He would therefore be liable to enhanced punishment under S. 75, Indian Penal Code, and S. 23 (1) (*a*) of the Criminal Tribes Act, but the last conviction was in 1923 when he was sentenced to rigorous imprisonment for three months under Ss. 457 and 380 of the Indian Penal Code, and as pointed out in *Karuppa Thevan*, In re,[1] the long interval of time between the last conviction and the commission of the present offence is a special reason to the contrary within the meaning of S. 23 (1) (*b*) of the Criminal Tribes Act. The sentence of the appellant

* Crl. App. No. 595 of 1938. 10th February, 1939.

1. (1929) 57 M.L.J. 743: I.L.R. 53 Mad. 80.

Villi Chinnu, *In re.*

is therefore reduced to rigorous imprisonment for two years for each of the offences and the sentences will run concurrently. Otherwise the appeal is dismissed.

B. V. V. —— *Sentence modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Vattipalli Rameswaramayya .. *Appellant** (*Plaintiff*)

v.

Raja Panuganti Parthasarathy Rayanimvaru, Zamindar of Kalahasti and others .. *Respondents* (*Defendants and Nil*).

Rameswaramayya *v.* Zamindar of Kalahasti.

Madras Estates Land Act (I of 1908)—Sale under—Service by affixture of notice—When justified—Requirement of 'due and reasonable notice' as under O. 5, r. 17 of C. P. Code—Construction—'If personal service cannot be effected'—Sale without proper notice—Ryot having knowledge of it—Validity of sale.

Though there is no explicit mention of 'due and reasonable diligence' in S. 112 of the Madras Estates Land Act the rule laid down in O 5, r. 17 of the C. P. Code with reference to service of notice applies to service of notice under that section. The expression 'if personal service cannot be effected' means that personal service cannot be effected when reasonable attempts have been made to effect it. To justify affixture, there must be reasonable diligence on the part of the process-server, as would justify the requirements of the Civil Procedure Code. Mere temporary absence of the person to be served does not justify affixture.

Semble: Where proper notice of a sale had not been given, the fact that the ryot was aware of the sale at the time when it actually took place will not be sufficient to validate it.

Appeal against the decree of the District Court of Nellore in A. S. No. 89 of 1932 preferred against the decree of the Court of the District Munsif of Kanigiri in O. S. No. 6 of 1931.

P. V. Rajamannar and *K. Subba Rao* for Appellant.

V. S. Narasimhachar, Ch. Raghava Rao and *P.S. Raghavarama Sastri* for Respondents.

The Court delivered the following

JUDGMENT.—The appellant sued to set aside a sale held in pursuance of a notice under S. 112 of the Madras Estates Land Act alleging irregularity, fraud, etc. We are now concerned only with the allegation that the notice required under S. 112 was not duly served upon the appellant and that therefore the sale was bad.

* S. A. No. 932 of 1934. 21st October, 1938.

Rameswaramayya v. Zamindar of Kalahasti.

The facts are no longer in dispute. There was only one notice and that was affixed after the process peon had ascertained from the wife of the appellant that he was absent from the village, having gone to another village four days previously, and that it was not known when he would return. The learned District Judge after discussing the various cases under the Civil Procedure Code in which it was held that mere temporary absence does not justify affixture, observes:

> "That there is no explicit mention of the 'due and reasonable diligence' in S. 112 of the Madras Estates Land Act and it may be admitted that the diligence evidenced by Ex. II would not be accepted by the Court as due and reasonable diligence under O. 5, r 17 of the Civil Procedure Code for the purpose of service of summons in a suit."

It is true that the words "due and reasonable diligence" do not appear in S. 112 which lays it down that if personal service cannot be effected service can be effected by affixture. But it seems to me impossible to avoid the conclusion that when the legislature says "if personal service cannot be effected", it must be taken to mean that it cannot be effected when reasonable attempts have been made to effect it. The Statute certainly cannot require an absolute, theoretical impossibility of personal service as a necessary pre-requisite to affixture; nor can it contemplate a merely technical or purely temporary inability to effect personal service, as justifying affixture. The only reasonable criterion to apply is that which has been expressly laid down with reference to service of notice in the Civil Procedure Code, namely, that there must be reasonable diligence on the part of the process-server before the Court can conclude that service could not be personally made and before the Court will be satisfied that the circumstances justify service by affixture. If so much is granted, it follows that the rulings under the Civil Procedure Code requiring due and reasonable diligence in attempting to effect personal service as a necessary preliminary to a valid service by affixture, will apply equally to service of notice under S. 112 of the Madras Estates Land Act. In view of the finding of the District Judge that in this particular case there has been no such due and reasonable diligence as would satisfy the requirements of the Civil Procedure Code, I must conclude that there has been no such diligence as would satisfy the requirements of S. 112 of the Madras Estates Land Act and that therefore service by affixture was not sufficient intimation of the approaching sale and that the sale is therefore bad. It

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is pointed out that there is a finding that the appellant was aware of the sale at the time when it actually took place. I am not satisfied that this fact, even if it be true, would be sufficient to validate a sale of which proper notice had not been given.

The result therefore is that the appeal is allowed and the plaintiff's suit is decreed so far as his interest in the suit land is concerned with costs throughout as against defendants 1 to 3.

Leave to appeal is refused.

K. C. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN AND MR. JUSTICE STODART.

Lakshmamma (dead) and another .. *Appellants** (*Petitioner and her L.R.*)

v.

P. S. Subramanyam .. *Respondent* (*Respondent*).

Lakshmamma v. Subramanyam.

Railway Provident Fund Rules—Declaration by a depositor of his illegally wedded wife as entitled to claim deposit after him—Whether such a wife a 'dependant' within the meaning of rules—Declaration proper.

There is nothing in the rules of the Provident Fund of the Southern Mahratta Railways requiring declarations to be made in favour of dependants only. There is no restriction with regard to the persons in whose favour declarations may be made by depositors.

Where the petitioner, a widow of a deceased subscriber to the Provident Fund of Southern Mahratta Railway, claimed a succession certificate to enable her to draw the amount standing to the credit of her deceased husband by reason of a declaration of his nominating her as his successor to claim the amount, but a son of the deceased opposed her claim on the ground of her not being the legally wedded wife of the depositor.

Held, that since there was no dispute regarding the fact that a declaration was made in favour of the appellant and the declaration was in accordance with the rules, it was a subsisting declaration at the time of the deceased's death and therefore the amount was payable to her.

Cuffley v. *Madras and Southern Mahratta Railway Co*, (1928) M.W.N. 402 and *Mon Singh* v. *Mothi Bai*, (1935) 71 M.L.J. 790: I.L.R. 59 Mad. 855, explained and distinguished.

Appeal against the order of the District Court of Chittoor dated 13th March, 1936 and made in O. P. No. 48 of 1935.

E. Venkataramana Rao for Appellants.

M. S. Krishnamurthi Sastri for Respondent.

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* A.A.O. No. 452 of 1936. 12th October, 1938.

Lakshmamma v. Subramanyam. — Burn, J.

The judgment of the Court was delivered by

Burn, J.—This is an appeal from an order of the learned District Judge of Chittoor on a petition by a Brahmin lady named Lakshmamma under S. 372 of the Indian Succession Act. The lady alleged that she was the widow of one P. Sambiah Sarma who had died while in employment as a station master on the Madras and Southern Mahratta Railway. She claimed a succession certificate to enable her to draw the amount standing to the credit of P. Sambiah Sarma in the Railway Provident Fund. It was not disputed that Sambiah Sarma, the depositor, had made a declaration under the Provident Fund Rules in favour of Lakshmamma, nominating her as the person to whom he desired the amount at his credit to be paid in the event of his death. One P. S. Subramanyam the son of P. Sambiah Sarma by his first wife opposed the application and alleged that Lakshmamma had never been legally married to his father. The learned District Judge found that Lakshmamma had lived with P. Sambiah Sarma as his wife for many years, but by reason of certain documents proved before him the learned Judge held that the lady had been married before to one Madyala Subramaniah. He held therefore that she could not have been the legally wedded wife of P. Sambiah Sarma. The learned Judge found accordingly that the provident fund money must go to the son of P. Sambiah Sarma because the son comes within the definition of "dependant" in S. 2 of the Provident Funds Act of 1925 and because the nomination which had admittedly been made by Sambiah Sarma in favour of the appellant must be treated as an unlawful nomination. The learned Judge states in paragraph 3 of his judgment that

"Under the Provident Funds Act only a dependant may be lawfully nominated and a dependant is defined as a wife, husband, parent, child, minor brother, unmarried sister, deceased son's widow and child or paternal grandparent."

We are unable to find any provision in the Provident Funds Act, which says that only a dependant may be lawfully nominated. On the contrary we think that S. 4 of the Provident Funds Act clearly implies that a nomination may be made in favour of a person other than a dependant. The learned District Judge has apparently been misled by applying to this case the rules of the Government General Provident Fund. The learned Judge quotes r. 7 (2) of the General Provident Fund Rules which is to the effect that a subscriber shall nominate

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one or more members of his family and r. 7 (3) says that *in the absence of a family* any person may be nominated but such nomination shall not be valid so long as the subscriber has a family. R. 7 (4) provides that on acquiring a family a nomination of an outsider previously made must be formally cancelled. These rules are not applicable to the Provident Fund of the Madras and Southern Mahratta Railway. We have examined the rules of the Madras and Southern Mahratta Railway Company's Provident Fund and they do not contain anything corresponding to r. 7 (2), (3) and (4) of the General Provident Fund. R. 21 of the Madras and Southern Mahratta Railway Provident Fund Rules says that when a deposit account is first opened, the member concerned shall be required to give a declaration in Form G. 45, particularising the person or persons by whom he is desirous that the whole or any portion of his deposit shall be received in the event of his death. It is provided that this declaration shall remain in force unless it is revised or cancelled by means of a notice in writing given to the Chief Auditor and Accountant in Form G. 45-A. The rule permits a depositor to make a fresh declaration at any time and it also provides that if the depositor is not a Hindu, Mohammadan, Buddhist or other person exempted from the operation of the Indian Succession Act any declaration already submitted by him shall forthwith become null and void on the occasion of his marriage or re-marriage and a fresh declaration shall be required. Form G. 45 bears upon its face an indication that the nominee need not be a dependant. After the declaration, a column is provided for the name and address of the nominee or nominees and then in column 2 the depositor is required to state whether the nominee is a dependant as defined in S. 2 (*c*) of the Provident Funds Act, 1925, or if not a dependant, the nature of relationship. This clearly implies that the nominee need not be a dependant.

Learned counsel for the respondent relies upon the decision of Mr. Justice Beasley (as he then was) in the case of *Cuffley* v. *Madras and Southern Mahratta Railway Co.*[1] In that judgment the learned Judge laid it down that where there are a widow and children left by the deceased subscriber to a provident fund, they are entitled to the benefit of the fund whatever be the

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1. (1928) M.W.N. 402.

Lakshmamma v. Subramanyam. —— Burn, J.

amount subscribed for, regardless of the nominations or assignments made by the subscriber. Relying upon this learned counsel for the respondent contends that since the petitioner was found by the learned District Judge not to be the legally wedded wife of the subscriber, she does not come within the definition of "dependant" in S. 2 of the Provident Funds Act. The son for whom learned counsel appears is a "dependant" since he is a child of the subscriber. It is therefore contended that the son has a right to this provident fund amount in preference to the lady nominated by the subscriber. This result would follow undoubtedly from the decision of Mr. Justice Beasley in the case referred to. We find however, in the first place, that the learned Judge really decided the case on a different point altogether. He found that the subscriber Mr. W.J. Cuffley had made a declaration in favour of his step-mother at a time when he had no legally wedded wife in existence. Subsequently he had married and had had children. The learned Judge found that the declaration made before marriage became null and void on the occasion of the subscriber's marriage. This was sufficient to decide the case and the learned Judge did decide it on this ground. But he went on to say that even if he were wrong in holding that the declaration was invalid, this would not necessarily mean that the nominee was entitled to the money in preference to the plaintiff and he proceeded to lay down the proposition already mentioned. We find however that the rules referred to by the learned Judge, namely, 21 and 22 have been very materially altered since the date of the judgment and we therefore do not feel ourselves bound to follow the learned Judge or to discuss in detail our reasons for dissenting from his conclusion. In a later case to which Sir Owen Beasley was a party (*Mon Singh* v. *Mothi Bai*[1]), the Provident Fund Rules of the Madras and Southern Mahratta Railway were again under consideration and the judgment was pronounced by one of us. It was there held :—

"It appears therefore that the money is not payable to a dependant as such unless the dependant is also nominated in the declaration. And r. 21 indicates precisely the nature and effect of the declaration." (*Vide* page 859.)

The judgment then goes on to quote r. 21 which has already been referred to. This is sufficient, we think, to show that Sir Owen Beasley would have recognised the difference

1 (1935) 71 M.L.J. 790: I.L.R. 59 Mad. 855.

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created by the alteration in the rules between the date of his judgment in *Cuffley* v. *Madras and Southern Mahratta Railway Co.*[1] and the present date. There is nothing in the rules of the Provident Fund requiring declarations to be made in favour of dependants only. There is no restriction with regard to the persons in whose favour declarations may be made by depositors. R. 22 as it now stands carries out the provisions of Ss. 3 and 4 of the Provident Funds Act. Under S. 3 (2) of the Provident Funds Act it is provided that any sum standing to the credit of any subscriber to, or depositor in, any such fund at the time of his decease and payable under the rules of the Fund to any dependant of the subscriber or depositor . . . . shall, subject to any deduction authorized by this Act, and, save where the dependant is the widow or child of the subscriber or depositor, subject also to the right of an assignee . . . . vest in the dependant, and shall, subject as aforesaid, be free from any debt or other liability incurred by the deceased or incurred by the dependant before the death of the subscriber or depositor. The reference to the rules of the fund shows that these provisions can only apply to sums which *under the rules* are payable to a dependant. It is quite clear that this section also recognises the possibility of sums being payable to persons other than dependants. Under r. 22 of the Madras and Southern Mahratta Railway Provident Fund Rules it is provided that if a declaration made by the depositor in accordance with the provisions of r. 21 subsists, the amount standing to his credit in the Fund, or the part thereof to which the declaration relates, shall, subject to the other provisions of these rules, be payable in accordance with such declaration. In the present case there is no dispute about the fact that the declaration was made in favour of the appellant and the declaration is in accordance with the provisions of r. 21. It was a subsisting declaration at the time of the depositor's decease and therefore the amount is payable to the appellant under the rules.

For these reasons we are of opinion that this appeal succeeds and we allow it with costs both here and in the Court below.

K. C. — *Appeal allowed.*

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1. (1928) M.W.N 402.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Appellate Jurisdiction.]

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

P.L.N.K.M. Nagappa Chettiar .. *Appellant** (*Plaintiff*)

v.

O. R. M. O. M. S. P. Firm and another .. *Respondents* (*Defendants*).

Nagappa Chettiar *v.* O. R. M. O. M. S. P. Firm.

Hindu Law—Constitution of trusts—Essentials—Banker and customer—Trust moneys—Application in discharge of customer's debts—Liability of banker to the trust—Suit against banker—If comes within S. 92, Civil Procedure Code—Limitation—Right to sue under Art. 120—When accrues—Application in insolvency of customer to have charge declared—If "election" which bars suit against banker.

Under Hindu Law all that is necessary to constitute a religious or charitable endowment is the intention to endow and the creation of a fund in fulfilment of the intention.

A banker is not entitled to apply what he knows to be trust funds, in discharge or reduction of a debt of a customer. If a banker does so he can be compelled to make restitution of the moneys so applied.

Coleman v. *Bucks and Oxon Union Bank*, (1897) 2 Ch. 243, applied.

A suit against a banker to recover trust moneys which he has misapplied does not come within the provisions of S. 92, Civil Procedure Code and may be instituted without the sanction of the Advocate-General.

Shanmukham Chetty v. *Govinda Chetty*, (1937) 46 L.W. 426, followed.

Where a trustee is kept in ignorance of a breach of trust the right to sue does not accrue until the trustee becomes aware of the fact.

Case-law discussed.

An unsuccessful application by the plaintiff for a declaration of a charge for the trust moneys in the insolvency of the customer, under the belief that the banker had paid the moneys to the customer cannot bar the present action against the banker for breach of trust and the doctrine of *election* can have no application.

On appeal from the judgment and decree of the Hon'ble Mr. Justice Lakshmana Rao dated the 27th day of March, 1936, and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C.S. No. 196 of 1933.

M. Patanjali Sastri and *K. P. Mahadeva Aiyar* for Appellant.

K.V. Krishnaswami Aiyar and *M. Murugappa Chettiar* for 1st Respondent.

The Court delivered the following

JUDGMENT.—The parties to this appeal are Nattukottai Chettiars. The appellant was the plaintiff in the suit. He is a trustee and he sued in that capacity on the original side of this Court to recover from the first respondent, a banker, trust

* O.S.A. No 36 of 1936. 9th May, 1938.

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moneys which he alleged the first respondent had wrongly applied in reduction of a debt owed by the second respondent. The first respondent is one Lakshmanan Chettiar, who carries on business in Madras under the style of the O. R. M. O. M. S.P. Firm. The second respondent is the uncle of the appellant and a co-trustee.

The father of the appellant was one Meenakshisundaram Chettiar, who did business in Madras with the second respondent, his brother. Meenakshisundaram died in 1914. After his death the joint family consisted of the appellant, his minor brother Lakshmanan and the second respondent. In 1916 the appellant and his brother separated from the second respondent and a deed of partition was executed. It was decided by the appellant and the second respondent that they should set aside out of the family funds two sums of Rs. 10,000 as endowments of specified religious charities. One sum of Rs. 10,000 was to be devoted chiefly to the maintenance of a water-supply at the Tirukalikundram temple, a famous Hindu temple in the Chingleput District, and the other sum of Rs. 10,000 was to be an endowment of another Hindu temple, known as the Kalayar Koil in the Ramnad District. It is common ground that out of the Tirukalikundram fund the temple piper was also to be paid. The appellant and the second respondent were to contribute to these funds in the proportions of $\frac{5}{8}$ and $\frac{3}{8}$ respectively. These provisions except the provision with regard to the payment of the piper were included in the deed of partition, which also provided that the appellant and the second respondent were to act as the trustees of the funds. The trust funds were created and it is admitted that the second respondent, being the uncle of the appellant and much older, was given the management of them. It is also admitted that the second respondent was given the right of investing the trust funds in his own business, if he so decided.

On the 1st December, 1916, the appellant drew, as his contributions to the two trusts, two hundies, payable to bearer, one for Rs. 6,250 and the other for Rs. 5,000. Previously a sum of Rs. 2,000 had been set aside for charity and this sum was taken into account in calculating the amounts which the appellant had to provide. The appellant handed the two hundies to the second respondent for investment on behalf of the trusts. At all material times both the appellant and the second respondent had banking private accounts with the first respondent. When the trusts were created the proprietor of the

O.R.M.O.M.S.P. Firm was Subramaniam Chettiar, the father of the first respondent. He had assisted at the partition of the properties between the appellant and his brother and the first respondent and had signed the partition deed as a witness. The second respondent handed the two hundies drawn by the appellant to Subramaniam Chettiar, who realized them by debiting the appellant's personal account, which was in credit, with the amounts. He then opened accounts in his books in the names of the two trusts, allocating to the Tirukalikundram temple trust the hundi for Rs. 6,250 and to the Kalayar Koil temple trust the hundi for Rs. 5,000. The allocations were in accordance with the instructions given to him. The arrangement made by the second respondent with the first respondent was that these moneys were to remain with the first respondent as *thavanai* loans with interest calculated annually. I should mention that the hundies themselves disclosed that they represented trust funds and an endorsement was made on each hundi by the then agent of the O.R.M.O.M.S.P. Firm acknowledging that the moneys had been received by the Firm. Subramaniam Chettiar died in 1918 and the business was then taken over by the first respondent, who had knowledge of it before he succeeded to it. It is not disputed that he knew that the moneys in these accounts represented trust moneys. His own books showed this.

For many years the second respondent had a large business in Madras and another business in Penang, but he became financially involved and on the 4th January, 1926, he was adjudicated an insolvent by this Court on a petition filed on the 10th October, 1925. On the 10th February, 1920, the second respondent had overdrawn his account with the first respondent to the extent of Rs. 15,700. The total amount standing to the credit of the two trust funds on this date was Rs. 15,732-15-9. With the consent of the second respondent the first respondent transferred Rs. 15,700 of the Rs. 15,732-15-9 standing to the credit of the trust accounts to the private account of the second respondent and paid to him the balance of Rs. 32-15-9 in cash. The result of this arrangement was that the second respondent's liability to the first respondent was discharged. The appellant was unaware of this arrangement and until 1929 he was kept in ignorance of the transaction. In 1924 he had been told by the first respondent's agent that the trust moneys had been withdrawn from the first respondent and had been taken over

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by the second respondent, but nothing was said to arouse his suspicions. When the second respondent was adjudicated an insolvent, the appellant filed an application in the insolvency proceedings asking that it be declared that the trust moneys constituted a first charge on the assets of the insolvent's estate in the hands of the Official Assignee. This application was filed on the 20th February, 1929.

When the second respondent arranged with the first respondent that his overdraft should be paid off by the transfer of the trust funds the second respondent opened accounts in his own books in the names of the two trusts, making a credit entry in each corresponding to the amount of the trust fund and debiting the first respondent with the amount. The second respondent set aside no moneys of his own for the purposes of these trusts, but merely made book entries. He did not even debit himself with the amounts. I will return to this part of the case later. The application of the appellant for a declaration that the trusts were entitled to the first charge on the second respondent's assets in the hands of the Official Assignee was heard by Waller, J., on the 15th October, 1928. The learned Judge dismissed the application on the ground that book adjustments could not be treated as passing trust moneys into the hands of the Official Assignee. An appeal followed, but was dismissed. Stated broadly, the decision of the appellate Court was that after the 10th February, 1920, the trust funds consisted of debts owing by the second respondent to the trusts, he having had the right to invest the trust moneys in his own business. It is not necessary to consider whether this decision is open to objection, because in the present case the Court is concerned with the question of the liability of the first respondent as a banker.

The present suit was filed on the 29th April, 1933, for a decree for Rs. 49,919-0-2, being the amount of the two trust funds as they stood on the 10th February, 1920, with interest at the *thavanai* rate for a period of 12 months. When he instituted the suit the appellant merely claimed a decree against the first respondent, but as the first respondent pleaded that the second respondent was a necessary party, the second respondent was added as a defendant on the 24th January, 1934. The second respondent, however, did not appear and the contest remained between the appellant and the first respondent. The

first respondent denied that the trusts had been duly constituted and pleaded that in any event there had been no breach of trust. He also contended that the suit could not be maintained in view of the provisions of S. 92 of the Code of Civil Procedure and of the Madras Hindu Religious Endowments Act, and raised pleas of estoppel and limitation. All these contentions were decided against the first respondent, except the contention that there had been no breach of trust. The learned Judge found that the second defendant had full authority to do what he did on the 10th February, 1920 and therefore the first respondent was not liable as a banker who had knowingly applied trust moneys to his own debt. Accordingly he dismissed the suit with costs. The appellant contends that as the first respondent took the trust moneys and utilised them in discharging the debt due to him by the second respondent he is liable to refund them with interest. He also contends that even if the arrangement between the first and second respondent could in law be regarded as a payment out to the second respondent of the trust moneys he had no authority to pay them out without the consent of the appellant, the co-trustee of the second respondent. The first respondent has persisted in the pleas raised by him before the learned trial Judge, except the plea that the Madras Hindu Religious Endowments Act is a bar to the suit.

It is idle for the first respondent to contend that the trusts were not validly constituted. They were constituted under the terms of the partition deed and moneys were set apart and deposited with the first respondent as *thavanai* loans. Under Hindu Law all that is required to constitute a religious or charitable endowment is the intention to endow and the creation of a fund in fulfilment of the intention. Here there was the intention and the creation.

Before proceeding to discuss the question of the validity of the arrangement of the 10th February, 1920, I will state what I conceive to be the law. A banker is not entitled to apply what he knows to be trust funds in discharge or reduction of a debt of a customer. If a banker does so he can be compelled to make restitution of the moneys so applied. There are many authorities dealing with this question, but it is not necessary to consider them in detail. The most important cases were considered by Byrne, J., in *Coleman* v. *Bucks and Oxon Union Bank*[1],

1. (1897) 2 Ch. 243.

where he held that reasonable suspicion puts a banker on inquiry when a benefit to himself is concerned. At page 254 of the report of the judgment there is this passage:—

"If bankers have the slightest knowledge or reasonable suspicion that the money is being applied in breach of a trust, and if they are going to derive a benefit from the transfer and intend and design that they should derive a benefit from it, then I think the bankers would not be entitled to honour the cheque drawn upon the trust account without some further inquiry into the matter."

If further the inquiry revealed a breach of trust the banker would be doing wrong if he honoured the cheque, and would render himself liable.

In this case it is admitted that the first respondent had full knowledge that the Rs. 15,700 which he transferred to the second respondent's account in discharge of his debt on the 10th February, 1920, constituted trust moneys, but stress has been laid on the fact that the second respondent had the right to invest the trust moneys in his own business and it is said that inasmuch as the second respondent immediately opened corresponding accounts in his own books, this amounted to an investment in his business. If the transaction did not amount to an investment of the trust funds in this way the first respondent is liable.

I will here pause to consider a finding of the learned trial Judge that when this transaction was carried through the second respondent was in affluent circumstances, much having been made of this point. That he was dealing in large sums of money cannot be doubted, and the evidence does not disclose that at the time he was actually insolvent, but it does not follow that he was in affluent circumstances or that his position was a sound one. The learned advocate for the first respondent confessed that he was unable to say what the financial position of the second respondent was at the time. The fact that his banker deliberately applied trust funds in payment of the overdraft which then existed does, however, in itself indicate that he had no confidence in the financial stability of his customer. But there are other indications that all was not well with the second respondent's position and that the first respondent knew this. At this time the first respondent was living at Devakottah and his banking business in Madras was being carried on by his agent. On the 7th February, 1920, the agent wrote a letter to his principal which would appear to have had reference to the second

respondent's indebtedness to the first respondent. This letter has not been produced nor has the press copy book kept by the Madras agent, although all other letters and press copy books have been produced. It would appear that in this letter of the 7th February, 1920, adverse reference was made to the second defendant's financial position. In addition to the non-production of the letter and the press copy, there is the fact that on the 17th February, 1920, the first respondent wrote to his agent in Madras saying:—

"You must not have credit and debit dealings in the current account for large amounts with P.L.N.K S.P. generally."

P.L.N.K.S.P. is the second respondent.

It has been argued that in spite of these facts it must be accepted that the second respondent was in affluent circumstances at the time, because later he was allowed to overdraw his account to a much larger extent and that his books show that in that year he paid a large amount to Government by way of income-tax. The fact that the first respondent allowed the second respondent to overdraw later does not necessarily indicate that he had confidence in his financial stability. At the most it shows that after the 10th February, 1920, he regained confidence, but a banker may let a customer whose credit is shaken have advances in respect of particular transactions if he is certain that the business will result in the money coming back to him. With regard to the payment of income-tax an examination of the books indicates that the second respondent was not able to pay at once what was due to Government. The payments made in 1920 comprised ten instalments. In these circumstances we are unable to agree with the learned Judge that it has been established that the second respondent was in affluent circumstances when the first respondent utilised the amounts standing in the trust accounts to discharge the second respondent's overdraft. The evidence points the other way.

Now, what was the effect of the transaction? It resulted in the disappearance of both the trust funds and the second respondent never replaced these moneys. In answer to a direct question put by the Court to the learned advocate for the first respondent in the course of his argument he frankly acknowledged that the first respondent knew when he transferred the trust moneys to the private account of the second respondent that the second respondent intended merely to constitute himself a debtor

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to the two trusts by making entries in his own books. In other words, the first respondent knew that the trust moneys were not to be replaced by cash and that the second respondent was merely intending to acknowledge liability to the trusts, and this at a time when the second respondent was unable to pay off his overdraft out of his own moneys. The contention that this was legitimate because the second respondent had the right to invest the trust moneys in his own business, is, it seems to me, fallacious. There could be no investment of the trust moneys in the second respondent's business unless they were replaced. They were not replaced and therefore there was no investment. The first respondent was not entitled to do what he did without being satisfied that the entries in the second respondent's books were going to be supported by cash. He took no steps to satisfy himself that this would be done. On the other hand he applied the trust moneys for his own benefit knowing full well that the second respondent was merely intending to constitute himself a debtor to the trusts. Moreover the first respondent was guilty of concealment of the transaction from the appellant who was also his own customer and to his knowledge the co-trustee of the second respondent. It is admitted that the appellant did not know of the disappearance of the trust fund until he filed the application for a declaration of a charge in the insolvency proceedings. Until 1924 he thought the moneys were still invested with the first respondent and it was only when the application to which I have referred came before the Insolvency Judge that he realised that the funds had disappeared altogether.

In these circumstances it must be held that the first respondent had knowledge that the moneys were being applied in breach of trust, and as the first respondent derived benefit from the transfer and intended and designed that he should derive a benefit from the transfer the case falls within the rule stated by Byrne, J., in *Coleman* v. *Bucks and Oxon Union Bank*[1]. Even if he had not got the knowledge he knew sufficient to be put on enquiry, which would also bring him within the rule. Holding this view the second contention advanced on behalf of the appellant, namely, that the first respondent could not deal with the trust funds without the consent of the appellant does not require to be decided, but in passing I may observe that it is difficult to see how the first respondent could be held liable on

1. (1897) 2 Ch. 243.

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this ground. The second respondent was admittedly the managing trustee and he had invested the trust funds with the first respondent.

It only remains to consider the contentions of the first respondent that the suit fails by reason of the doctrine of estoppel, the law of limitation and the provisions of S. 92 of the Code of Civil Procedure. The contention with regard to estoppel is based on the doctrine of election and it is this. It is said that, inasmuch as the appellant filed an application for a declaration of charge in the Insolvency Court and there failed, he cannot now turn round and seek to make the first respondent liable. There is here a misconception of the position and the law. When that application was filed, the appellant was under the impression that the first respondent had paid out the trust moneys to the second respondent and that they had been invested in the second respondent's business. This was not the case, and the appellant having realised as the result of the proceedings in the Insolvency Court that the trust funds had been applied by the first respondent for his own purpose he filed the present suit. The doctrine of election can have no application here. The cause of action was different and the suit was filed in order to establish the liability of the first respondent. It is true that the second respondent wae added as a party as the result of the attitude of the first respondent, but again the cause of action against the second respondent in this suit is a different one. It is now sought to make him liable for a breach of trust. There was no question of breach of trust in the previous proceedings.

In view of the Full Bench decision of this Court in *Subbiah Thevar* v. *Samiappa Mudaliar*[1], it is accepted that the article of the Limitation Act which applies is Art. 120. That article states that limitation shall start to run when the right to sue accrues, and as the cause of action arose when the trust funds were transferred to the first respondent on the 10th February, 1920, the right to sue accrued on that date. It has been held by this Court and other High Courts in India that, where a trustee is kept in ignorance of a breach of trust, the right to sue does not accrue until the trustee becomes aware of the fact. *Basavayya* v. *Bapanna Rao Sowcar*[2], *Tirumal Rao* v. *Tun-*

1. (1938) 1 M.L.J. 334: I.L.R. (1938) Mad. 586 (F.B.)
2. (1929) 58 M.L.J. 349.

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gamma Shettithi[1], *Muruga Chetty* v. *Rajaswamy*[2], *Venkateswara Aiyar* v. *Somasundaram Chettiar*[3], *Peruri Viswanadham* v. *Pendela Narayana Doss*[4], *Lal Singh* v. *Jai Chand*[5] and *Mathura Singh* v. *Rama Rudra Prasad Sinha*[6]. There are two decisions of this Court which tend the other way. *Ottapurakkal Thazhate Soopi* v. *Cherichil Pallikkal Uppathumma*[7] and *C. Prasanna Venkatachella Reddiar* v. *The Collector of Trichinopoly*[8], but the weight of authority is in favour of the view that knowledge is a factor. The appellant had no knowledge of this breach of trust until 1929 and this is not disputed. There can be no doubt that the true position was concealed from him until 1929 and as the suit was filed in 1933 it was filed in time.

The argument which is based on the provisions of S. 92 of the Code of Civil Procedure is that, as the appellant asked the first respondent to account for the trust moneys in his hands, it was a suit for the taking of accounts of a trust and therefore falls within the purview of the S. 92. It is clear that this suit was not a suit for an account in that sense. It was a suit against a banker to recover trust moneys which he has misapplied. In *Shanmukham Chetty* v. *Govinda Chetty*[9], a bench of this Court of which I was a member held that a suit by trustees against co-trustees for accounts does not come within the provisions of S. 92 and may be instituted without the sanction of the Advocate-General. This contention must also be overruled.

My learned brother concurs in this judgment and the appeal will, therefore, be allowed with costs in both the Courts. There will be a decree against first respondent for the sum of Rs. 15,700 with interest from the 10th February, 1920, to the date of this judgment at the *thavanai* rates and annual rests which was agreed upon when the moneys were deposited by the second respondent with the first respondent and interest at 6 per cent. will be payable on the decretal amount from the date of judgment. The advocate's costs will be on the higher scale of one and one-third of the regulation fee both here and below.

K. S. —— *Appeal allowed.*

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1 (1914) 1 L.W. 134.
2. (1915) 29 M.L.J. 574.
3. (1917) 7 L.W. 280.
4. (1928) 28 L.W. 224.
5. (1930) I.L.R. 12 Lah. 262.
6. (1935) I.L.R. 14 Pat. 824.
7. (1909) I.L.R. 33 Mad. 31.
8. (1914) I.L.R. 38 Mad. 1064.
9. (1937) 46 L.W. 426.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Civil Jurisdiction.]

PRESENT:—MR. JUSTICE MOCKETT.

The Asiatic Government Society Life Assurance Company, Limited .. *Plaintiffs**

v.

The New Asiatic Life Insurance Company, Limited .. *Defendants.*

Asiatic Government Society Life Assurance Co., Ltd. *v.* New Asiatic Life Insurance Co., Ltd.

Trade name—Passing off—Name of company—Suit for injunction restraining the use of the name—Matters to be proved to entitle plaintiff to such an injunction.

In an action to restrain the defendant company by an injunction from carrying on business under a particular name as similar to the plaintiff company, the real issue is whether the similarity in the names of the two companies taken with the evidence shows affirmatively that the defendant company's name is such as is calculated to deceive the public and to divert business from the plaintiffs to the defendants or to cause confusion between the two companies.

Where the plaintiff was carrying on business under the name "The Asiatic Government Security Life Assurance Company, Limited" and the defendants began to trade under the name "The *New* Asiatic Life Insurance Company, Limited", the defendant's name is not one likely to mislead the public, as the word "new" is a decisive difference in conjunction with the further circumstances among others:—

(i) That the defendants have not got the words Government Security,

(ii) that the plaintiff company is not generally known as the 'Asiatic', and

(iii) The absence of evidence that any person was deceived or that after four years' interval after suit filed, the plaintiff company had in fact been damnified.

Nugent Grant instructed by *V. Rajagopalachari* for Plaintiffs.

K. Rajah Aiyar and *C. Venugopalachari* for Defendants.

The Court delivered the following

JUDGMENT.—The plaintiffs, the Asiatic Government Security Life Assurance Co., Ltd., sue the defendants, the New Asiatic Life Insurance Co., Ltd., claiming an injunction restraining the defendants from carrying on business, etc., under the name of 'The New Asiatic Life Assurance Co., Ltd.,' or any other name which includes the word 'Asiatic' which is likely to deceive or mislead the public into the belief that the defendant's company is the same as the plaintiff's company. In para. 3 of the plaint the plaintiffs allege that their name, and particularly the

* C. S. No. 386 of 1934. 8th September, 1938.

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word 'Asiatic,' had come to be associated with the plaintiffs' company in the minds of the public. I emphasise 'the public.' In para. 4 they allege that the defendants' name substantially is the same as that of the plaintiffs' company and is a colourable imitation of the plaintiffs' company's name. In para. 5 plaintiffs allege that the defendants must have known of the plaintiffs' company's existence and designation and that the action of the defendants in choosing and coining for themselves a name substantially similar to that of the plaintiffs is deliberate and is not *bona fide*. In para. 7 they allege that the defendants' name is calculated to deceive the public and that considerable confusion is likely to be caused by a similarity of the names. I observed that in the plaint title the plaintiffs have wrongly described the defendants as an Assurance Co., whereas the correct description is Insurance Co., and I directed the plaint to be amended accordingly so as correctly to describe the defendant company.

The defendants in their written statement, para. 13, pleaded that, by reason of the plaintiffs' company being incorporated in Mysore State and not under the Companies' Act, it had no right of suit, but that defence has not been put forward before me: on the other hand, the right of plaintiffs to sue is conceded. In para. 5 they state that they were not aware of the existence of the plaintiff company either at the time of its registration or for a considerable time thereafter. The general trend of the written statement is a denial of the allegations in the plaint, especially the allegation that the defendants' name is calculated to deceive or likely to cause confusion. No issues were settled, but I hold that the issue before me is whether the plaintiffs have proved that the use of the defendants' name is calculated to deceive and so to divert business from plaintiffs to defendants or to cause a confusion between the two companies. This topic has been the subject of a very large number of decisions many of which have been cited before me, but I consider that the point I have to decide is as indicated above and is correctly stated in Kerly on Trademarks, 6th Edition, at the bottom of page 567.

This suit has been tried before me in August, 1938. The plaint was filed on the 19th October, 1934, nearly 4 years ago. The delay has therefore been deplorable and has been the subject of an investigation not relevant to the decision of the case, but

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the fact of the delay must be emphasised for two reasons: Firstly because the defendants say that during all this interval of time the Court did not grant an injunction and secondly because owing to passing of time the actual development of the business of these two companies is known, and I am now in a different position from that in which I should have been in 1934 when the developments in the future would naturally be matters of conjecture. I should however say a word about the absence of an application for an interim injunction. It seems to me to be common ground that at the time, it was agreed that an interim injunction need not be sought and that a speedy trial should be had. I draw the inference from the records that neither side was specially concerned at the speedy trial not materialising; but it is well to say that the case appeared in the list an immense number of times. It may be for this reason that the question of the interim injunction disappeared. However, the suit now comes before me for trial under the above circumstances.

I propose first of all to examine the facts and later to consider the law in relation to the facts as I find them. (His Lordship then discussed the evidence). . . . .

I have endeavoured to summarise the evidence before me and have given a finding with regard to one aspect of the case —the conduct of the defendants' company. I must now turn to what is really the crux of the matter, namely, whether the similarity in the names of the two companies taken with the evidence satisfies me that the defendants' company's case is calculated to deceive the public and to divert business from the plaintiffs to the defendants or to cause confusion between the two companies. A comparison of the two names is therefore important. The plaintiffs' name is the Asiatic Government Security Life Assurance Co., Ltd., the defendants' is the The New Asiatic Life Insurance Co., Ltd. I attach no importance to the difference between 'Assurance' and 'Insurance' for I very much doubt if the average man could be sure whether companies of this sort with which he was familiar described themselves as 'Insurance' or 'Assurance', although he might know the rest of the names well enough. The plaintiffs' company's name has the words 'Government Security'. Those words are not present in the defendants' name. Before the word 'Asiatic' there is the word 'New' in the defendants' name. It is known that the

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plaintiffs' company must have the words "Registered in Mysore" attached to its description, but those words are absent from the defendants' name. One has only to look at the authorities to realise the difficulties of arriving at a decision in this matter. In Kerly on Trademaks, 6th edition, will be found collected on pages 571 to 574 examples where injunctions have been granted and where injunctions have been refused. Many of these cases have been cited to me and I will deal with some of them, but, with the utmost respect, I do not find the authorities of great assistance beyond the point where they lay down the law to be applied. In each case it is a question of fact to be decided on the special facts of that case and it is interesting in this respect to see how distinguished judges have taken the view that a name was likely to deceive when other distinguished judges have taken exactly the opposite view. It must come back always to answering one question—on the facts of the case before me, guided by the law laid down in the decided cases, has it been proved to my satisfaction that the defendants' name is calculated to deceive or to occasion confusion? The decided cases do however seem to impress me with one idea, namely, that before the Court will grant an injunction, a very high standard of affirmative proof is required to establish the plaintiffs' case or that the similarity of the names is of itself sufficient.

In *Hendriks* v. *Montagu*[1], James, L.J., states what the Court has to decide in these matters in the form of a question at page 645:

" Now, is there such a similarity between those names as that the one is in the ordinary course of human affairs likely to be confounded with the other? Are persons likely who have heard of the 'Universal' to be misled into going to the 'Universe'?"

In that case the plaintiff represented the Universal Life Assurance Company and the defendant 'The Universe Life Assurance Association'. James, L.J., proceeds:

" I should think, speaking for myself, very likely indeed. Many people do not care to bear in mind exactly the very letters of everything they have heard of, and we have had a great body of evidence before us of persons, whose business it is to be acquainted with these Life Assurance companies, all of whom concur in deposing in the strongest possible terms that nothing is more calculated to injure an old society of this kind than having a new society established which has got a name so similar to that of the other as that it is likely to be mistaken for it."

1. (1881) 17 Ch. D. 638.

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Mr. Grant relies very strongly on this case. I would respectfully say that it seems to me clear that the name of the defendant company in that case must have misled and confused persons with regard to the plaintiff company. But, apart from that, there was, I observe, a great deal of affirmative evidence on the point. There is none before me. A further circumstance is that, at its inception, there was included in the defendants' advertisements a statement that its temporary offices were at Mansion House buildings, only about 300 yards from the plaintiff company's premises. *The Guardian Fire and Life Assurance Co.* v. *Guardian and General Insurance Co., Ltd.*[1], is a decision of Jessel, M.R. The plaintiff company was incorporated in 1821 and carried on its business at 11, Lombard Street and the defendant company carried on business at 31, Lombard Street, and it had been formed to take over the goodwill of the *Guardian Horse and Vehicle Insurance Association, Ltd.*, which was registered under the description of the Guardian and General Insurance Co., Ltd. There was evidence in that case about the misdirection of letters and the learned Judge took the view that the plaintiff company was known to the public as "Guardian Assurance" or "Guardian Company". He also took the view that the change of the name was deliberate and found the defendant guilty of 'legal fraud'. That again seems to be a very strong case. Mr. Grant relies on it and says 'Here is a case of a company known by a shortened name'—a fact which appears to have been established; but I do not think it has been established in this case that the plaintiff company was known to the public by its shortened name, however much its title may have been abbreviated in the official publications. After all this interval of time, I have virtually no evidence before me to show that the public thought that the plaintiff company was known by the name 'Asiatic' and, as I have indicated, none of them have come forward to say that they were misled.

Turton v. *Turton*[2] and *Tussaud* v. *Tussaud*[3] were cited, but those cases do not assist me as they are directed towards establishing the proposition that a man cannot be deprived of the use of his own name. *Manchester Brewery Company, Limited* v. *North Cheshire and Manchester Brewery Company, Limited*[4],

1. (1880) 50 L.J. (Ch.) 253.
2. (1889) 42 Ch. D. 128.
3. (1890) 44 Ch. D. 678.
4. (1898) 1 Ch. 539.

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is an interesting case. There were at one time two companies, the Manchester Brewery Company and the North Cheshire Brewery Company. The latter company was purchased by persons who started a new company named the North Cheshire and Manchester Brewery Company. Byrne, J., took the view that the defendant's name was not likely to deceive, but the Court of Appeal decided otherwise, and, as I understand it, the basis of their decision, as expressed by the Master of the Rolls, was that to embody the whole of the name of another company into a new company was likely to suggest to the public that the original company's business was being carried on by the new company. I observe in that case that oral evidence was forthcoming to this effect. That case is, of course, very different from the case before me. *Ewing* v. *Buttercup Margarine Company, Limited*[1], was cited and I observe that Astbury, J., states the question for decision on page 6 as I have endeavoured to state it from the authorities, and it would seem that since 1917 the law has undergone no change. Astbury, J., thought that that case was very near the line, but Lord Cozens Hardy, M.R., considers that it was "a perfectly plain and clear case, not very near the line, but well over the line". There was apparently a great deal of affirmative evidence in that case. Mr. Grant relies on it very strongly because the plaintiff company was a north British concern, the nearest branch to the south being at West Hartlepool, whereas the defendant company had its office in Westminster. In that case, of course, the decision turned on the use of the word "Buttercup" by the defendant. As Bankes, L.J., said at page 12 "the distinctive feature" of the plaintiff's "trade name is 'Buttercup' ". The learned Judges have no hesitation whatever in holding that there was a probability of deception and confusion. Bankes, L.J., points out, on page 12, that it was not material that the business of the plaintiff was mainly confined to Scotland and parts of the North of England. I would respectfully say that that case seems to me to be a very clear example of one company using the distinctive name attached to the goods sold by an earlier established company and that, the goods being identical, confusion would be inevitable.

The National Bank of India v. *The National Bank of Indore*[2] is a decision of Mulla, J. He emphasizes that it is

1. (1917) 2 Ch. 1. 2. (1922) 24 Bom. L.R. 1181.

not necessary for the plaintiff to prove fraudulent intention. It would seem that the learned Judge was influenced, and I respectfully agree, by the fact that the plaintiff bank's business in gold bars was likely to be prejudiced by the similarity of the names. He was impressed by the great similarity in the names and it is on that general impression that the defendant's name was likely to deceive that he decreed the plaintiff's suit. The learned Judge was naturally impressed by the similarity in the pronunciation of 'India' and 'Indore', but what also appears to have influenced him was that with this similarity in pronunciation, the defendant should have thought fit to add also the words "National Bank". From a perusal of the judgment I would respectfully say that I too take the view that in that case the defendant's name is likely to deceive. Mr. Grant relies on the decision of Pearson, J., in *Accident Insurance Co., Ltd.* v. *Accident, Disease and General Insurance Corporation*[1]. Pearson, J., held in that case that

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> "either of the companies would, in the course of business, become known by a name shorter than the whole name, and that the old company (which had been in existence for 14 years at the time of the judgment) is known as 'The Accident Company'."

The learned Judge comments on the fact that the defendant company did not put the word 'Disease' first in its name. "It might", he observes, as well have called itself by the words "Disease, Accident and General Insurance Corporation" or "put the word 'General' first". In the form in which it did come into existence he considers there was a probability of deception and that the plaintiffs were entitled to succeed. In the case before me, the defendant does not begin its name with the word 'Asiatic' but puts the word 'New' first.

Mr. Grant naturally relied on the judgment of Fletcher, J., in *Oriental Government Security Life Assurance Co., Ltd.* v. *Oriental Assurance Co., Ltd.*[2], which, on the face of it, would seem very near to this case, because Fletcher, J., held that as the word 'Oriental' has become identified with the plaintiff company the defendant company would be restrained from using the word 'Oriental' in its name, by which I understand the learned Judge to mean that the word 'Oriental' could not be used at all. The plaintiffs relied very strongly on that case, but

1. (1884) 54 L.J. (Ch.) 104. 2. (1913) I.L.R. 40 Cal. 570.

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there the defendant company was known as "The Oriental" or "The Oriental Assurance Company," and I would respectfully agree with Fletcher, J., in holding that the "Oriental Assurance Co." would almost inevitably be confused with another beginning with the word 'Oriental' and ending with 'Insurance Co.' But if this is a decision that the use of the word 'Oriental' at all is prohibited, I would record my respectful doubt as to that part and that part only. The above cases are relied on by Mr. Grant.

Mr. Rajah Aiyar has also referred to certain authorities. *The Society of Motor Manufacturers and Traders, Ltd.* v. *Motor Manufacturers, etc., Insurance Co., Ltd.*1, is a decision of Lawrence, J., as he then was. I do not think that case assists me. As observed by Lawrence, J., at page 685:

"It is important to bear in mind first, that this is not a case of fraud; secondly, that the business of the defendant company is altogether different from and in no way competes with the business of the plaintiff society; and, thirdly, that the name of the plaintiff society is descriptive and consists entirely of words in ordinary use in the English language"

He considers that the addition in the defendant's name of "Mutual Insurance Co." and the absence of the words "Society of" are sufficient to distinguish the two companies. The short judgment of Sargant, L.J., at page 692, I respectfully suggest, differentiates that case from this case. *Saunders The Sun Life Assurance Society* v. *Sun Life Assurance Company of Canada*2, is an authority for the proposition that, in the absence of fraud or dishonesty the defendant could not be r estrained from the use of their own aime if it involved no misstatement of fact. The Sun Life Assurance Co. of Canada had as well established a name in Canada as the Sun Life Assurance Society in England. Stirling, J., held that the defendant company must take all steps to prevent their agents using the words "The Sun" or "The Sun Life" without the addition of the words "of Canada" in referring to their company. The plaintiff company had been established in 1810 and the defendant company in Canada in 1882 after various changes in its description. It seems to me that that case would have been more relevant if this was a suit by the defendants against the plaintiffs instead of by the plaintiffs against the defendants and if the question had arisen if the plaintiff company having in the Mysore State acquired the name

1. (1925) 1 Ch. 675. 2. (1894) 1 Ch. 537.

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of the Asiatic Government Security Life Assurance Co., Ltd., could be restrained from using it in British India. Mr. Rajah Aiyar relied very strongly on *Hopton Wood Stone Firms, Ltd.* v. *Gething*[1]. That was a passing off action in which the Hopton Wood Stone Firms, Ltd., sought an injunction to restrain the defendants from carrying on business under the name of Hopton Stone and Marble Quarrying Co., Ltd. and the case turned on the significance of the word "Hopton" in relation to 'Stone' and a great deal of evidence was called about it; but Parker, J., at page 626, was satisfied with the undertaking by the defendants made at his suggestion that the defendants should carry on business as "The New Hopton Stone and Marble Quarrying Co." or from their proposed company under the name of the "New Hopton and Marble Quarrying Co., Ltd." in which case, as he observed, all danger of any such confusion would be avoided. Parker, J., continues:

"The defendants consented to this suggestion and offer that undertaking that the word 'New' shall be the initial word of their business style and the name of any company they register. I accept this undertaking as giving the plaintiffs all the reliefs to which on the facts as I find them they would possibly be entitled."

The learned Judge had previously found that the plaintiffs' stone and the defendants' stone were the same and that the defendants were entitled to sell their stone under that name, but it will be seen at page 625 he observes that confusion would probably arise if the defendants carried on business or formed a company under or with the title of which the word "Hopton" is the first word. And it will be seen that the learned Judge took the view that by prefixing the word 'New' all difficulties would be avoided. This is of great interest, because both the learned Counsel in this case have been unable to refer me to any case like the case I have to decide—a case where a company with an established name sued another company with the same or a similar name but with the word 'New' added at the beginning of the latter's name. It is appropriate at this stage to say—and these matters must be surely matters of impression—that the word 'New' to my mind, differentiated the defendant company from the plaintiff company even without the other difference which is in the title; and it is interesting in deciding

1. (1910) 27 Patent and Trademark Cases 605.

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matters of this sort which, except in the most flagrant cases, must always be of difficulty to find that so distinguished a Judge as Lord Parker, sitting then as a Judge of First Instance, should have taken what seems to be a similar view, and it is some satisfaction to me in arriving at this result, to know that my impression was formed before the above decision had been brought to my notice. In the vast number of law suits authorities cited are generally relevant to questions of law but in this case the authorities are virtually decisions on questions of fact and indicate how questions of fact impress the minds of the judges by whom the cases are tried. Mr. Rajah Aiyar referred to the following cases, *Colonial Life Assurance Co.* v. *Home and Colonial Assurance Co.*[1], where Romilly, M.R., repelled the claim of the plaintiff company to obtain what he described as the monopoly of the use of word 'Colonial'. In the case before me the plaintiffs are claiming the sole use of the word "Asiatic" because they claim that that word is the sign mark of their company. It seems to me that that is an untenable position and that they must succeed, if they succeed, not on that basis but on the basis of similarity of names. In *The London and Provincial Law Assurance Society* v. *The London and Provincial Joint-Stock Life Assurance Company*[2], Shadwell, V.C., did not think that the defendants' name was likely to deceive. In *Merchant Banking Company of London* v. *Merchants' Joint Stock Bank*[3], Jessel, M.R., decided against the plaintiff company and it will be seen from his judgment that he arrived at his conclusion on a very simple basis that he does not consider that the names are sufficiently similar to deceive. In *Bumsted* v. *The General Reversionary Co., Ltd.*[4], was referred to. The plaintiff company's name was the General Reversionary and Investment Co. and the defendant's name was General Reversionary Co., Ltd. Sterling, J.'s judgment is of assistance to me in that he states that it is not sufficient to show that there is a similarity of names but it must also be shown that there is a reasonable probability that the use of the name would result in the defendant appropriating the material advantage of the plaintiff's business. He held on the evidence and considering the small nature of the defendant's business

1. (1864) 33 Beav. 548: 55 E. R. 482.
2. (1847) 17 L.J. (Ch.) 37.
3. (1878) 9 Ch. D. 560.
4. (1887) 4 T.L.R. 621.

and that it was carried on in Liverpool that there was no such reasonable probability as to justify him in interfering on an interlocutory application, but the learned Judge concludes his judgment by suggesting that the defendants would do well to change their name as soon as possible. *Meikle* v. *Williamson*[1], was cited, because in that case a misdirection of letters alone was held not sufficient and does not alone tend to prove that a customer who intends to deal with the one firm, is likely to mistake the other for that firm. In this case, it is important, as I have already said that there is no evidence that anybody was misled.

So much for some of the cases which have been cited. As I said at an early stage it seems to me that, as the case-law is so well established, the decision must rest on the facts. Putting the names side by side and comparing them I can only say that it does not seem to me that the defendant company's name was likely to mislead the public, that the word 'New' at the beginning was a decisive difference and, added to that there are the following circumstances, all of which should be taken into account. The plaintiff company has the words 'Government Security' which the defendant company has not. The plaintiff company is a Mysore company and must have the description 'Registered in Mysore' added to its name. The defendant company lays stress on the fact that it is sponsored by and associated with name of Birla Brothers and is in Delhi. I am not in the least satisfied that the plaintiff company is *generally* known as the 'Asiatic'. I do not consider that abbreviations in some books, although not in all the books, is sufficient to establish that fact. I think that that is a fact which the plaintiff should have proved to my satisfaction. I agree that whether the name is calculated to deceive is entirely a matter for myself, and on the alleged similarity of name alone I am not in the least persuaded that the plaintiffs have a good case. But, even adding to such similarity as there is the statement of the defence witness Subbiah, there still remains as far as I am concerned a complete lack of certainty that the public spoke and thought of the company as the "Asiatic". Even if the public did so speak of the plaintiff company, I am not thereby satisfied that they would confuse the 'Asiatic Company' with

1. (1909) 26 Patent Cases 775.

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the 'New Asiatic Company'. The evidence on the plaintiff's side does not alter any impression I have formed as to the probability, or perhaps I should say improbability, of deception by the defendant's name. I am not satisfied that, because in insurance matters insurance experts may have abbreviations to refer to certain companies, it necessarily follows that the public used the same term. No expert has said that he was confused. I am not satisfied, if it is material, that any actual harm has been done by the defendant company. The plaintiff company has, I am glad to see, prospered. It is notorious that a large number of insurance companies have come into existence in India and the progress of the plaintiff company seems to be entirely satisfactory. I have already emphasized the very strange position in which I am placed in trying a suit for an injunction when matters remained as they were for a period of four years, but I ought to record that, had the case been tried within a week of its being filed, I feel I should have arrived at the same conclusion. Holding as I do that the defendant company's name was not calculated to deceive or cause confusion, in accordance with the legal principles which are now so clearly settled I must dismiss this suit with costs, but, in view of my last observation, I would add again (if it is relevant for me to do so) that, since the filing of the suit, nothing has happened to satisfy me that there has been that measure of confusion and deception as would entitle me to grant an injunction. Two counsel certified.

S. V. V. ——— *Suit dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE LAKSHMANA RAO.

Kizhakkekara Natuvil Mankolath Illoth Govindan Nambudiri, karnavan and manager of the illom .. *Appellant** (*Plaintiff*)

v.

Sooppiatath Amad, karnavan and manager of the tarwad .. *Respondent* (*2nd Defendant*).

Govindan Nambudiri v. Sooppahatt Amad.

Mortgage—Usufructuary mortgage—Trespasser in possession even on date of mortgage—Mortgagee not put in possession—Suit by mortgagor against trespasser to recover property—Right to possession and mesne profits.

* S. A. No. 124 of 1934. 29th April, 1938.

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The plaintiff in a suit had executed a usufructuary mortgage in favour of a third party for a period of two years and the mortgage deed recited that possession of the mortgaged properties had been given to the mortgagee but they were not delivered to him. The plaintiff brought a suit to recover those properties from the defendant, a trespasser in possession even from a date prior to the execution of the mortgage, with mesne profits. The mortgage was not redeemed, though the term of the mortgage expired before the institution of the suit.

Held, that the plaintiff mortgagor was entitled to sue the trespasser for possession and mesne profits even during the subsistence of the mortgage. The mortgagor would be entitled to mesne profits at least by way of damages for the loss resulting to him from the trespass and prevention of the mortgagee from realising the profits towards the mortgage money, for which he continued to be liable.

Mohideen Rowther v. *Jayarama Aiyar*, (1920) 40 M.L.J. 38: I.L.R. 44 Mad. 937 relied on.

Appeal against the decree of the Court of the Subordinate Judge of Tellicherry in A. S. No. 72 of 1931 (A.S. No. 425 of 1930, District Court) preferred against the decree of the Court of the District Munsif of Taliparamba, in O. S. No. 847 of 1921.

P. Govinda Menon for Appellant.

K. P. Ramakrishna Aiyar for Respondent.

The Court delivered the following

JUDGMENT.—The plaintiff is the appellant, and the suit as amended in pursuance of the judgment of the High Court in S.A. No. 86 of 1927 is for recovery of the plaint properties from the respondent with mesne profits from 1919.

The title of the appellant to the suit properties is admitted and it is not disputed that as found by the Courts below the respondent is a trespasser in possession since 23rd September, 1918. The suit was instituted on 3rd December, 1921 and normally the appellant would be entitled to a decree for possession with mesne profits from 1919 as claimed. But the appellant had on 1st May, 1919, executed a usufructuary mortgage of the properties in favour of one Moosan Kutti and his son Muhamad Kunhi for a period of two years, and though it is recited in the deed of mortgage that possession had been given, the respondent was in possession of the mortgaged properties and they were not delivered to the mortgagees. The debt is outstanding though the term of the mortgage expired before the institution of the suit, and the right of the appellant to possession and mesne profits during the subsistence of the mortgage was challenged. The District Munsif upheld the claim of the appellant to possession and mesne profits from 1921 and since

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he had taken possession of the properties and realised the mesne profits in execution of the decree which was reversed in S. A. No. 86 of 1927, the District Munsif declared and decreed that the appellant was entitled to recover possession of the properties with mesne profits for the year 1921. An appeal was taken by the respondent and the Subordinate Judge disallowed the claim for possession and mesne profits.

The mortgage has not been redeemed though the term has expired and the question for decision is whether during the subsistence of the mortgage the appellant is entitled to sue for possession and mesne profits. It was not disputed that in the absence of a contract to the contrary the mortgagor has a statutory duty to put the usufructuary mortgagee in possession of the mortgaged properties nor was it contended that there was any contract to the contrary in this case. The appellant has thus a statutory duty to put his usufructuary mortgagees in possession and it is common ground that the mortgaged properties were not delivered to the usufructuary mortgagees in spite of the recital in the deed of mortgage. The latter are not bound to sue and obtain possession from a trespasser in possession on the date of the mortgage, and as held by Reilly, J., in *Krishna* v. *Subbanna*[1], after considering the entire case-law on the point, so long as the appellant has a statutory duty to put his mortgagees in possession he has a right himself to sue the trespasser for possession in order that he may fulfil that duty. There is no such statutory duty when the transferee is dispossessed by a trespasser after being put in possession as in the cases relied upon by the Subordinate Judge and as pointed out in *Mohideen Rowther* v. *Jayarama Aiyar*[2], the mortgagor would be entitled to mesne profits at least by way of damages for the loss resulting to him from the trespass and prevention of the mortgagees from realising the profits towards the mortgage money for which he continues to be liable. The decision of the trial Court was therefore right and the decree of the Subordinate Judge cannot be sustained. It is therefore set aside and the decree of the trial Court is restored with costs here and in the lower appellate Court.

Leave to appeal is granted.

K. C. —— *Appeal allowed.*

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1. A.I.R. 1929 Mad. 611 at 615.
2. (1920) 40 M.L.J. 38: I.L.R. 44 Mad. 937 at 941.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW.

Govinda Goundan and others .. *Petitioners** (*Respondents*)

v.

Ayi Goundan and another .. *Respondents* (*Petitioners*).

Govinda Goundan *v.* Ayi Goundan.

Criminal Procedure Code (V of 1898 as amended), Ss. 133, 137 and 139-A —Burial of corpse in place alleged to be public—Preliminary order under S. 133 directing removal of corpse—Respondent claiming private possession of place—Order absolute under S. 137—Jurisdiction to make—Proper procedure.

Where a Sub-Divisional Magistrate passed a preliminary order under S. 133, Criminal Procedure Code, relating to the burial at a certain place which was alleged by the first party to be a public place, and the second party appeared before the Magistrate and contended that the place of burial was in their private possession and that the burial did not cause annoyance to anybody, and the Magistrate thereupon took evidence on both sides and passed an order absolute under S 137 of the Code,

Held, that the order passed by the Magistrate was totally without jurisdiction and should be set aside. As there was some reliable evidence in the case in support of the case set up by the second party the Magistrate had no option but to adopt the procedure under S. 139-A of the Criminal Procedure Code as amended, and to stay his hands referring the party who moved him to go to the Civil Court.

Ude Singh v. *Mohammada*, (1928) I.L.R. 10 Lah. 151; *Kusha Mandal* v. *President, Gopalnagar Union Board*, (1934) I.L R. 61 Cal. 390; *Thakur Sao* v. *Abdul Aziz*, (1925) I.L.R. 4 Pat. 783; *Raghunandan* v. *Shew Nandan*, (1932) A.L.J. 339, *Chunni* v. *Emperor*, (1938) A.L.J. 1013 and *Hamid Ali* v. *Emperor*, (1930) 32 Cr L.J 250, relied on.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Sub-Divisional First Class Magistrate of Sankari dated 30th September, 1938 and made in M. C. No. 63 of 1938.

N. Somasundaram and *M. Veluswami* for Petitioners.

C. S. Swaminathan for Respondents.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court made the following

ORDER.—In this case, the Sub-Divisional First Class Magistrate of Sankari has passed an order under S. 137 of the Criminal Procedure Code making absolute the preliminary order made by him under S. 133 of that Code. The order relates to the burial of a corpse in a certain place which was alleged by the petitioners in the case and also by the President of the District Board to be a public place. The respondents before

* Crl. R. C. No. 780 of 1938. 27th January, 1939.
Crl. R. P. No. 742 of 1938.

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the Magistrate who are the petitioners in this Court appeared before the Magistrate in response to the preliminary order which directed them to remove the corpse from the place in question and they contended that the place of burial was in their private possession and also that the burial did not cause annoyance to anybody. In these circumstances, the obvious procedure to follow was that prescribed in S. 139-A of the Code, which was introduced by the amending Act of 1923. Unfortunately, this section seems to have escaped the notice of the learned Magistrate who instead of proceeding thereunder and deciding whether the evidence put before him by the respondents before him supporting the denial of the existence of any public right in the place in question was reliable, took evidence on both sides beginning with the evidence adduced on the side of the petitioners before him, and after considering the evidence on both sides, he came to the conclusion that the place of burial was definitely a public place. He puts it in paragraph 4 of his order as follows:—

> "On considering the evidence of the petitioners and the counter-petitioners, I have no hesitation in concluding that the alleged place of burial is definitely a public one. Though the counter-petitioners have examined a number of witnesses, they are persons of no worth comparatively while the petitioners' witnesses include the Health Inspector, two Village Officers and Oor Goundan of the village. They have all given evidence to the effect that the alleged place of burial is a public one. . . . . . . The evidence of the counter-petitioners fails to refute this allegation. It appears to be true that Rama Goundan the deceased father of the counter-petitioners installed the Pillayar in the Pillayar temple near the place of burial about twenty years ago. . . . . . The counter-petitioners allege that they have been storing manure and tying cattle on the site in question."

But the learned Magistrate refused to infer any right of possession from this evidence because village porombokes are generally made use of by the ryots for such purposes. As regards the evidence adduced about the planting of trees in the site by the respondents before him, he observed that it must have been recent. There is no doubt that the Magistrate has come to the conclusion that the place is a public one only after weighing the evidence adduced before him by both sides. This is not permitted by Chapter X as amended by the Act of 1923. This point has been stressed in several decisions of the High Courts. It is enough to refer to them and to give extracts from one or two of them. These decisions are reported in *Raghunandan* v.

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Shew Nandan[1], *Chunni* v. *Emperor*[2], *Hamid Ali* v. *Emperor*[3], *Ude Singh* v. *Mohammada*[4], *Thakur Sao* v. *Abdul Aziz*[5] and *Kusha Mandal* v. *President, Gopalnagar Union Board*[6]. The last two are Bench decisions. In *Ude Singh* v. *Mohammada*[4], Addison, J., held that the Magistrate can proceed under S. 137 only if he finds there is no reliable evidence in support of the denial of the public right in the place in question, and that where there is any reliable evidence, the Magistrate must stay proceedings. He observed also:

"It is not the duty of the Magistrate to come to a finding whether the evidence is sufficient in his opinion to support the case of the respondents; all that he has to see is whether there is any reliable evidence in support of the denial of any public right . . . . . ."

If there is, the Magistrate must "stay his hands till the matter has been decided by a competent Civil Court". Similar observations are to be found in the other decisions. As per Mullick, J., in *Thakur Sao* v. *Abdul Aziz*[5]:

"The law requires first of all that the party shall appear before the Magistrate and deny the existence of the public right in question. Secondly, that he shall produce some reliable evidence, and thirdly, that such evidence shall be legal evidence and shall support the denial. If these three conditions are satisfied, then the Magistrate's jurisdiction ceases to exist." *See* bottom of page 786 and the beginning of page 787.

The learned Judges who decided the case reported in *Kusha Mandal* v. *President, Gopalnagar, Union Board*[6], point to the alteration of the law which was introduced by S. 139-A of the Code, the law before the amendment being that the Magistrate had to decide whether the claim of the second party was *bona fide* or not, or in other words, whether the claim is a mere pretence or not. Before that amendment, no doubt, it was permissible and proper for the Magistrate to take evidence on both sides. But now what is to be decided is whether the denial of the public right by the second party is supported by any reliable evidence and if there is any reliable evidence in support of such denial, the Magistrate has no option but to stay his hands and to refer the parties who moved the Magistrate to take action to go to the Civil Court. It cannot be said that there was no reliable evidence in support of the denial made by the petitioners nor does the Magistrate say there is no reliable evidence. As a matter

1. (1932) A.L.J. 339.
2. (1938) A.L.J. 1013.
3. (1930) 32 Cr.L.J. 250.
4. (1928) I.L.R. 10 Lah. 151.
5. (1925) I.L R. 4 Pat. 783.
6. (1934) I.L.R. 61 Cal. 390.

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of fact, the learned Magistrate appears to have lost sight of S. 139-A of the Code, and proceeded to conduct an enquiry straightaway under S. 137, Criminal Procedure Code. In doing so, he has assumed a jurisdiction which he did not possess and would not possess unless he had found beforehand that there was no reliable evidence to support the denial of the public right by the petitioners, that is to say, by the respondents before him.

The order of the Magistrate is totally without jurisdiction and it is therefore set aside. In view of the fact that there is some reliable evidence in this case in support of the denial, it is not open to the Magistrate to take further action in the same matter under Chapter X of the Code of Criminal Procedure.

B. V. V. —— *Petition allowed.*

PRIVY COUNCIL.

[On appeal from the Chief Court of Oudh at Lucknow.]

PRESENT:—LORD ATKIN, LORD PORTER AND SIR GEORGE RANKIN.

The Oudh Commercial Bank, Limited, Fyzabad .. *Appellants**

v.

Thakurain Bind Basni Kuer and others .. *Respondents.*

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Civil Procedure Code (V of 1908), Ss. 47, 48, O. 21, r. 2 and O. 34, r. 10—Executing Court—Powers of—Mortgage decree—Sale proceedings—Agreement between parties giving time—Provision for enhanced interest—Enforceability—Application for continuance of execution—Whether constitutes fresh application—Limitation.

An application for execution of a decree is not a fresh application within the meaning of that sub-section by reason merely that steps have to be taken to undo the action of a Court in terminating an execution case contrary to the intention of the parties; nor is the application made a fresh application because it contains a claim for a higher rate of interest which had been agreed to in a compromise, or because only part of the properties originally mortgaged remain bound as security and saleable under the decree. The character of the application must be decided on the facts of each case, and the substance of the matter must prevail over the form of the application.

In October, 1912, the mortgagees of certain ancestral properties obtained a preliminary decree of sale against the mortgagor. From 1912 to 1917 there were protracted proceedings between mortgagor and mortgagees, and in 1917 a compromise was entered into between the mortgagees and the Court of Wards acting on behalf of the mortgagor, which contained a bargain for time on the interest payable being increased. Disputes arising out of the compromise culminated in an appeal to His Majesty in Council in 1921, a result of which was that the increased rate of interest was confirmed by Order in

* P.C. Appeal No. 60 of 1937. 27th January, 1939.
Oudh Appeal No. 16 of 1934.

Council In 1922 a sale which was ordered of the mortgagor's rights in part of the mortgaged property was cancelled on terms of repayment by the mortgagor of principal and interest by a certain date, the rate of interest being increased, and certain properties being released from the mortgage to make the repayment possible. In 1923 the Court then seised of the matter consigned the execution proceedings to records contrary to the intention of the parties. In 1927 the agreement was embodied in a petition of compromise which preserved to the mortgagee the right to levy execution on default by the mortgagor. That compromise was registered as an adjustment under O. 21, r. 2, Civil Procedure Code. From 1927 to 1930 the mortgagor made various payments under the compromise. Subsequently he made default, whereupon the mortgagees applied to the Court for realisation by sale of the balance still due.

Held, that the later application made in those circumstances was not a fresh application within the meaning of S. 48 (1) of the Code, and that it was not barred as having been made more than twelve years after the final decree.

Held, further, that in respect of the mortgage decree it was competent for the executing Court to give effect to the terms agreed between the parties as to enhanced interest in consideration of a forced sale being averted.

The Civil Procedure Code contains no general restriction of the liberty of parties to contract with reference to their rights and obligations under a decree, and if they do contract on terms which have reference to and affect the execution, discharge or satisfaction of the decree, the provisions of S 47 of the Code involve that questions relating to such terms may fall to be determined by the executing Court. There is no principle which lays down that the original decree cannot be altered or varied by the parties even with the sanction of the Court, or that the mere consent of the parties cannot confer such a jurisdiction on the executing Court. A fair and ordinary bargain for time in consideration of a reasonable rate of interest is not to be regarded as an attempt to give jurisdiction to a Court to amend or vary the decree.

Appeal from a decision of the Chief Court of Oudh dated 13th August, 1934, reversing an order of the Subordinate Judge, Fyzabad, dated 26th November, 1932.

W. Wallach for Appellants.—The application of March, 1931, for realisation of the balance due under the compromise of 1927 was not a fresh application within the meaning of S. 48 (1), Civil Procedure Code. The protracted proceedings between the parties, with the acknowledgments in writing by the mortgagor, and his various payments of principal and interest provided fresh starting points for the period of limitation. The mortgagor is estopped from now challenging the compromise agreement of 1927 with its provision for a higher rate of interest. By that agreement he secured the release of a substantial part of the mortgaged property, as well as additional time. It is submitted that the Chief Court was wrong in ruling that the parties had no right to increase the rate of interest without an order of Court, with the result that the agreement for increased interest was unenforceable.

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Krishna Menon for Respondents.—The application of March, 1931, is barred by limitation by virtue of S. 48, Civil Procedure Code, which must be considered and construed without reference to the fresh starting points for the limitation period which are contemplated by Ss. 19 and 20 of the Limitation Act. The provision for increased interest contained in the compromise agreement of 1927 is not enforceable. That provision goes outside the ambit of the original decree, and cannot be regarded either as an amendment or as an "adjustment" of it.

27th January, 1939. Their Lordships' judgment was delivered by

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SIR GEORGE RANKIN.—This is a decree-holder's appeal. It is brought by the Oudh Commercial Bank, Ltd., Fyzabad, against an order of the Chief Court of Oudh dated the 14th August, 1934, dismissing an application for the execution of a final decree for sale passed on the 22nd January, 1916, by the Subordinate Judge, Mohanlalganj, Lucknow. The respondents are the representatives of Babu Narindra Bahadur Singh (herein called the "judgment-debtor") who died in 1936 while the present appeal was pending.

He was the grantor of a mortgage to the appellants dated the 2nd September, 1894, for Rs. 2,35,000 at 8 per cent. per annum over a large number of ancestral properties including both proprietary (*kham*) and under-proprietary (*pukhtadari*) villages. To enforce this mortgage a suit was brought against him by the appellants in 1911 and a preliminary decree for sale obtained on the 31st October, 1912, from the Subordinate Judge. On appeal to the Judicial Commissioner's Court this preliminary decree was on the 15th June, 1915, varied, so as to fix the amount outstanding on the mortgage at Rs. 7,96,763, carrying interest at 4 per cent. from the 3rd July, 1915. Very soon thereafter the Court of Wards, by order of the Government, assumed management of the judgment-debtor's estate, which was not released till the 29th September, 1917. Accordingly the Deputy Commissioner of Fyzabad, as manager for the Court of Wards, became the defendant in the mortgage suit and the final decree for sale was passed against him (22nd January, 1916). It fixed the amount then due at Rs. 8,14,470 with future interest at 4 per cent. on Rs. 7,96,763.

The proceedings in execution of this decree have been protracted, but, apart from the application which has now been

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brought before their Lordships, consist of an application to the Court which passed the decree (Mohanlalganj) to transfer it for execution to the Subordinate Judge at Fyzabad (7th September, 1916); an application to the Fyzabad Court for an order for sale of all the mortgaged property (3rd July, 1917); and an application of the 16th January, 1922, asking that the previous proceedings, which had been much interfered with by stay of execution and otherwise, should be restored and continued notwithstanding that the Revenue Court and the Court of the Subordinate Judge had "consigned it to records". This last application was granted by order of the Subordinate Judge dated the 17th January, 1922.

It appears that, when in 1916-17 the appellants were proceeding to enforce their decree for sale, the Court of Wards made a bargain with them for time in which to pay off the mortgage debt gradually, the rate of interest to be increased from 4 per cent. to 6½ per cent. Sufficient payments had been made under this arrangement to meet this interest and to repay a certain amount of the principal monies due on the decree, when the judgment-debtor recovered the management of his own affairs in September, 1917, and repudiated the action of the Court of Wards, maintaining that its intervention in his affairs had been wholly illegal. In December, 1917, he carried in objections to the appellants' execution proceedings, maintaining (1) that the final decree for sale was not binding upon him as the Deputy Commissioner did not represent him; (2) that the Court of Wards had no right to agree to pay interest at a higher rate than the 4 per cent. mentioned in that decree. The Subordinate Judge dismissed these objections (17th May, 1918); on appeal the Court of the Judicial Commissioner dismissed the first but gave effect to the second, holding that all payments made by the Court of Wards should be credited in reduction of the decretal dues on the footing of interest at 4 per cent. only. To their decree of the 16th December, 1918, a statement of account was annexed showing the amount outstanding as at that date for which execution could proceed. This sum should have been entered as Rs. 7,65,898, but by an error in calculation it was entered as Rs. 6,70,610; this error was put right on an application under S. 152, Civil Procedure Code, by order of the Judicial Commissioner's Court dated the 29th August, 1918.

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Both parties obtained a certificate enabling them to appeal to His Majesty in Council from this decree of the 16th December, 1918. On the 9th February, 1920, by Order in Council on the judgment-debtor's petition, a stay was granted until the determination of the appeal, upon the terms (*a*) that the judgment-debtor would pay interest at 6½ per cent. in lieu of 4 per cent. from the 7th September, 1916, until realisation and (*b*) that the present appellants' appeal should be withdrawn. The judgment-debtor's appeal to His Majesty was dismissed in May, 1921, but, the Order in Council not having been so drawn as to give effect to the undertaking to pay increased interest; another Order in Council was passed on the 25th May, 1922, amending the previous Order in Council by directing that this provision for increased interest be added to the decree of the Court of the Judicial Commissioner dated the 16th December, 1918. This direction was not formally communicated to the Fyzabad Court (under O. 45, Civil Procedure Code) till November, 1922, and in the meanwhile execution had been stayed from January to July, 1922, by an injunction obtained by the judgment-debtor in a separate suit attacking the legality of the action of the Court of Wards.

These were the causes which had rendered ineffectual until 1922 the application for execution made by the appellants to the Subordinate Judge at Fyzabad in July, 1917, and which account for their application of the 16th January, 1922, to restore and continue the execution proceedings, and for the order granting this application. The circumstance that the appellants when applying for transfer of the decree, for an order for sale, and for an order to continue, did so on each occasion upon a tabular statement (O. 21, r. 10, Civil Procedure Code), hardly conceals the fact that so far they had made one application for execution of the final decree and one only.

As the property comprised in the mortgage was ancestral, execution proceedings had to be transferred to the Collector, and Schedule III, Civil Procedure Code, applied to them (Ss. 68, 69, Civil Procedure Code). After the order of the Subordinate Judge in 1922, the judgment-debtor's under-proprietary rights in certain villages were sold by the Revenue Court in October, 1922, but on the 18th November, 1922, the sales were cancelled by agreement, the judgment-debtor agreeing to pay certain sums by October, 1923. These he paid.

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Another agreement was made on the 3rd April, 1924, by which half of the amount then due should be paid by the 1st April, 1925, and the balance by the 1st April, 1926, interest after March, 1924, being increased from 6¼ to 8 per cent. per annum, to be paid half-yearly and with half-yearly rests. As a term of this agreement, half of the proprietary and all the under-proprietary villages were released from the mortgage to enable the judgment-debtor to raise the money necessary to make the promised payments. This agreement was not fully carried out, but time was given to the judgment-debtor who made several payments in 1926. On the 9th March, 1927, a final agreement was made by the parties. This final agreement was embodied in a petition of compromise which fixed the amount then due at about 3¼ lacs of rupees and arranged for payment of principal by annual sums of Rs. 50,000 and of interest at 8 per cent. per annum half-yearly with a liability for compound interest in case of default:—

> "The proceedings for auction sale shall remain in abeyance in case the fixed instalments be paid regularly. In case any instalment or part of any instalment or amount of interest or part of interest be not paid at the appointed time, then the decree-holders will be competent to immediately take out execution in respect of their entire demand and recover their entire demand from that property which the decree-holders have not released from the liability of their demand by auction sale in accordance with the terms of this compromise."

On the 14th March, 1927, the Sales Officer at Fyzabad sent the compromise petition to the Fyzabad Court in order that it might be forwarded to the Court which was competent to amend the decree of the 22nd January, 1916, in accordance with the new arrangement for compound interest at 8 per cent. What provision of the Civil Procedure Code was thought to authorise such an "amendment" of a decree does not appear; but the Sales Officer and the parties expected, it would seem, to receive through the Fyzabad Court an "amended decree". In fact, as we now know, though execution proceedings had been actively proceeding before the Sales Officer at Fyzabad from 1923 to 1927, the Subordinate Judge at Fyzabad had in October, 1923, consigned the execution case to records and returned the papers to the Court at Mohanlalganj. This he had done, apparently, without notice to the decree-holders, and as a result of correspondence with the Deputy Commissioner, in view of the fact that the judgment-debtor had been carrying out the terms of the arrangement of November, 1922, cancelling the judicial sales of

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October, 1922. In these circumstances the Fyzabad Court on the 21st March, 1927, sent the compromise petition to the Court at Mohanlalganj, and the Subordinate Judge of the latter Court recorded the substance of it in the appropriate register as an adjustment under O. 21, r. 2, Civil Procedure Code, this being the only action upon the compromise which he had any authority under the Code to take. No amended decree was ever brought into existence and the Sales Officer's reminders to the Fyzabad Court did not result in his getting any such document; but in 1927 and down to 1930 the judgment-debtor made various payments under the compromise arrangement which were recorded in the Court at Mohanlalganj. He was, however, in default when on the 24th March, 1930, the appellants applied on a tabular statement to the Mohanlalganj Court to transfer the decree back to Fyzabad for execution. Despite the objection of the judgment-debtor that his default had not made the total sum immediately payable, a transfer certificate was issued for Rs. 2,14,287, and on the 19th March, 1931, the appellants filed another application under O. 21, r. 10, at Fyzabad. In this they asked that the balance due under the compromise—Rs. 2,10,985—should be realised by the sale of certain proprietary villages which had not been released from the mortgage, reciting that the arrangement in case of default had been that "the sale proceedings would be resumed according to the papers."

The main question before their Lordships is whether this application of the appellants is barred by S. 48 of the Civil Procedure Code as being more than 12 years from the date of the final decree for sale (22nd January, 1916). The learned Subordinate Judge on the 26th November, 1932, held that the application was a fresh application within the meaning of that section, but that the appellants were entitled under cl. 3 of r. 11 of Schedule III of the Code to an allowance of time which was sufficient to bring them within 12 years from 1916. The Chief Court (14th August, 1934), considered that the appellants were not entitled to any allowance of time under this clause, that they could not be allowed to treat any other date than the 22nd January, 1916, as the date of the decree and that Ss. 19 and 20 of the Limitation Act did not apply to the period limited by S. 48 of the Code. They also held that the appellants could not in any case have execution for any higher rate of interest than 6¼ per cent. From their decision dismissing the appellants'

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application for execution the present appeal has been brought to His Majesty in Council.

In view of the great difference of judicial opinion disclosed by the decisions of High Courts in India as to the effect in execution cases of bargains for time or other compromises a number of matters have been discussed by learned counsel on both sides. But the first matter for consideration under S. 48 of the Code is whether or not the appellants' application for sale is a "fresh application" or is to be regarded as merely ancillary to or incidental to the prosecution or continuation of the application of 1917 which had been reinstated in 1922. The appellants proceeded by way of tabular statement under O. 21, r. 11, both on the 24th March, 1930, when asking for transfer of the decree to Fyzabad and also on the 19th March, 1931, when asking for an order for sale, but one of these tabular statements was unnecessary in any view. They seem always to have approached the Court in this particular manner even when in 1922 they were expressly asking for continuation of proceedings previously brought. And they adopted the same course on the 19th March, 1931, though their prayer was that the sale proceedings which had been depending at the date of the compromise of 1927 should be resumed or taken up according to the papers already prepared in the Revenue Court. The learned Subordinate Judge considered that the application should be regarded as a fresh application because the property sought to be sold was not the whole taluqa but only half of the proprietary villages, because interest was to be realised at 8 per cent. and because the appellants had applied afresh to the Court which passed the decree and had obtained in 1930 a transfer back to Fyzabad. The learned Judges of the Chief Court do not discuss this question in their judgment and it may be that it was not argued before them. But though the procedure adopted by the appellants tells against them on this point, it is very necessary, if their rights under their decree are to depend upon it, to examine closely the position in which they were placed by the compromise of 1927. In their Lordships' opinion the recording of the payments made thereunder by the Court at Mohanlalganj and the application to that Court for a retransfer of the decree to Fyzabad were consequential upon and are attributable to the circumstance that the execution Court at Fyzabad had acted as though the execution in that Court were at an end. In September, 1923, the Subor-

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dinate Judge had written to the Deputy Commissioner asking what had happened in this execution case and had been told that 5 lacs had been paid, that the parties were coming to an agreement, that the matter would not be settled for at least two years and that there was no need for him to keep the file pending any longer. Accordingly the case was by order of the 6th October, 1923, consigned to records as partly satisfied and a sum of 5 lacs credited. From the judgment of the Subordinate Judge we learn that the papers were returned to Mohanlalganj. Nevertheless for four years sale proceedings had actively continued before the revenue authorities at Fyzabad in the sense that bargains for time had been made, recorded, partly carried out, and renewed while the necessary steps for carrying out the sale were being from time to time adjourned. In 1924 a compromise had been recorded by the Subordinate Judge and a number of properties released by his order of the 5th April, 1924. The compromise of 1927 was made upon the footing that there was a subsisting execution proceeding in the Fyzabad Court under which action could be taken for sale at any moment, and in respect of which postponement of sale could be made conditional upon the judgment-debtor carrying out the terms agreed. The fact that the parties or their advisers or the officials of the Revenue Court desired to have an amended decree from whatever Court was competent to give it resulted in the Subordinate Judge at Fyzabad taking action in continuation of what he had done in October, 1923, which unexpectedly ended the execution case at Fyzabad and involved a retransfer of the decree by the Court at Mohanlalganj. "This Court," says the Subordinate Judge, "had sent the papers back to the original Court and so forwarded the compromise also." No doubt the learned Judge was much puzzled as to the proper course to take on receiving the request to obtain an amended decree. Their Lordships appreciate his difficulty, but in these circumstances they cannot think it right to regard the appellants' application as a fresh application in the sense of S. 48 of the Code merely by reason of the steps which they thought it necessary to take to undo the action of the Court at Fyzabad in terminating the execution case contrary to the intention of the parties. Nor do they consider that the claim of interest at 8 per cent. (agreed to in 1924 for the first time and acted on thereafter by the parties in their protracted negotiations) made the application a fresh applica-

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tion as distinct from one to continue the previous proceedings as contemplated by the compromise of March, 1927. Nor did the fact that only part of the original properties remained bound by the security and saleable under the decree. It was on the contrary an application to revive the previous proceedings on the footing that they had not terminated. The question of the character of the application has to be decided upon the circumstances of each case, and in the present case the bargain of the parties is a circumstance of great importance as is the fact that the Fyzabad Court acted by inadvertence contrary thereto. The substance of the matter must prevail over the form of the application which, in their Lordships' opinion, is not a fresh application as contemplated by S. 48.

This conclusion renders it unnecessary that their Lordships should examine other contentions of the parties save the contention upheld by the Chief Court that in any event interest cannot be recovered in execution of the decree of the 22nd January, 1916, at more than 6¼ per cent. It is said that there is no order of any Court for more than 6¼ per cent. The agreement for 8 per cent. was first made in 1924. It was made with the knowledge of the Sales Officer and approval of the Deputy Commissioner, and a large number of villages were released from the mortgage as part of that bargain. The bargain was referred to in the petition of the appellants to the Subordinate Judge at Fyzabad filed in 1924 under O. 21, r. 2, though the term as to interest was not expressly mentioned. An order was obtained from him directing the release of the villages from sale. So, too, in 1927 the amount due under the decree was fixed by agreement of the parties upon a calculation of 8 per cent. for part of the time, and further time was given to the judgment-debtor upon that footing from 1927 to 1930. The decree in the present case was a final decree for sale, and, as is now recognised by r. 10 of O. 34, the mortgage account has to be carried down to the time of actual payment in order to get a final adjustment of the amount to be paid. All costs, charges and expenses properly incurred by the mortgagee up to that time have to come into the account. Yet if the Chief Court's view be right the executing Court is wholly without jurisdiction to include even by agreement interest payable under an arrangement whereby the mortgaged property has been saved from a forced sale under the decree. The authority relied upon

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by the learned judges of the Chief Court is *Gobardhan Das* v. *Dau Dayal*[1] and the principle invoked is that the original decree cannot be altered or varied by the parties even with the sanction of the Court, and that in any case mere consent of the parties cannot confer such a jurisdiction on the executing Court. This line of reasoning is not without support from other decisions of Indian High Courts, though authority and practice to the contrary is also to be found. On this difficult and important question their Lordships are not in agreement with the view taken by the Chief Court. They do not consider that it takes sufficient account of the facts that the Code contains no general restriction of the parties' liberty of contract with reference to their rights and obligations under the decree and that, if they do contract upon terms which have reference to and affect the execution discharge or satisfaction of the decree, the provisions of S. 47 involve that questions relating to such terms may fall to be determined by the executing Court. "Amendment," or alteration of the decree whether under S. 152 or by review is a different matter under the Code. No doubt an adjustment, if not recorded under O. 21, r. 2, cannot be recognised by any Court executing the decree. The compromise of 1927, however, was recorded; it was an adjustment even if it was something more, and it contained the terms upon which the adjustment was agreed to. It was not an attempt to bring under the decree a liability extraneous to the mortgage or the mortgage suit (cf. *Pradyumna Kumar Mullick* v. *Kumar Dinendra Mullick*[2]). Their Lordships see nothing in the Code requiring them to hold that, had the judgment-debtor paid the agreed instalments punctually, the appellants, after 1927, could have executed the decree for the whole sum outstanding contrary to the terms of the compromise. Nor do they think it reasonable that such a compromise, if enforced by the executing Court, should not be enforced as a whole. They are not prepared to regard a fair and ordinary bargain for time in consideration of a reasonable rate of interest as an attempt to give jurisdiction to a Court to amend or vary the decree. Such a bargain has its effect upon the parties' rights under the decree, and the executing Court under S. 47 has jurisdiction to ascertain its legal effect and to order accordingly. It may or may not be that any and every

1. (1932) I.L.R. 54 All. 573 (F.B.).
2. (1938) 1 M.L.J. 743: L.R. 64 I.A. 302, 308: I.L.R. (1938) 1 Cal 66 (P.C.).

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bargain which would interfere with the right of the decree-holder to have execution according to the tenor of the decree comes under the term "adjustment": on that their Lordships do not pronounce. Nor will they here consider what consequences would flow from a finding that a particular bargain for time was not an adjustment. In the absence of express statutory authority it is not possible in their Lordships' view to regard O. 20, r. 10, as excluding any possibility of the parties coming to a valid agreement for time to which the Court under S. 47 will have regard. The rule does not apply to all decrees, but only to decrees for the payment of money in so far as they are of that character. The purpose of providing a limitation of six months for such applications to the Court which passed the decree is not altogether plain, and the objects may be more than one; but this provision, like the rule itself, affords no sufficient ground for holding that the Code makes parties wholly incompetent to come to an arrangement for time enforceable in execution proceedings. Such bargains may take different forms, and it is not possible to pre-judge the individual case. If it appears to the Court, acting under S. 47, that the true effect of the agreement was to discharge the decree forthwith in consideration of certain promises by the debtor, then no doubt the Court will not have occasion to enforce the agreement in execution proceedings, but will leave the creditor to bring a separate suit upon the contract. If, on the other hand, the agreement is intended to govern the liability of the debtor under the decree and to have effect upon the time or manner of its enforcement, it is a matter to be dealt with under S. 47. In such a case to say that the creditor may perhaps have a separate suit is to misread the Code, which by requiring all such matters to be dealt with in execution discloses a broader view of the scope and functions of an executing Court. Their Lordships are in agreement with the statement in the case of *Gobardan Das* (p. 585 of the report *supra*) that "in numerous cases a compromise between the decree-holder and the judgment-debtor entered into in the course of execution proceedings, which was duly recorded, has been enforced" and they are not of opinion that the practice, which is both widespread and inveterate, is contrary to the Code. They are of opinion that in the present case the compromise can and should be enforced in these execution proceedings.

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They will humbly advise His Majesty that this appeal should be allowed, the decree of the Chief Court set aside, and the order of the Subordinate Judge dated the 26th November, 1932, restored. The respondents must pay the costs of the appellants in the Chief Court and of this appeal; in addition, the appellants will have liberty to add these costs, if unpaid, to their security.

Solicitors for Appellants: *Hy. S.L. Polak & Co.*

Solicitors for Respondents: *Nehra & Co.*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

Margaret Lornie .. *Appellant* (Plaintiff)*

v.

Abu Backer Sait, Minor by guardian Alli Mohammad Soomer Sait .. *Respondent (Defendant).*

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Guardian and ward—Personal contract entered into by guardian—Liability of minor—Suit filed against minor alone—Remedy against minor's estate whether available—Money borrowed by guardian for developing minor's estate—Binding nature—Guardian and Wards Act, 1890, S. 27—Direct recourse against minor's estate—Limitation Act (IX of 1908), S. 19—Agent duly authorised—Guardian of minor acknowledging liability.

A guardian cannot enter into a covenant or contract on behalf of the ward so as to impose a 'personal liability' on the latter, the expression to be understood in this context as including a liability of his estate as well. Where a guardian enters into a personal contract of loan the remedy of the creditor ordinarily against the guardian personally though the latter could claim to subrogated to the right of indemnity which the guardian himself might ave in respect of moneys whether of his own or borrowed from others, hich he had applied for those purposes of the estate which are permitted to 1m by law. In proper cases and where the guardian is also impleaded as a party to the suit the right of subrogation can possibly be worked out in the same suit and without the necessity for a fresh one. Otherwise the best that the creditor can get, where he has sued the minor direct without impleading the guardian as party, is a mere declaration that he is entitled to subrogation but not a decree executable against the minor's estate by a process of execution.

Waghela Rajsanji v. *Shekh Masludin,* (1887) L.R. 14 I.A. 89: I.L.R. 11 Bom. 551 (P.C.) and *Indur Chunder Singh* v. *Radhakishore Ghose,* (1892) L.R. 19 I.A. 90: I.L.R. 19 Cal. 507 (P.C.), relied on.

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*Appeal No. 257 of 1934. 16th November, 1938.

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Dowse v. *Gorton*, (1891) A.C. 190; *Raybould* v. *Turner*, (1900) 1 Ch. 199 and *Srishchandra Nandi* v. *Sudhirkrishna Banerji*, (1931) I.L.R. 59 Cal. 216, referred to.

The minor's estate cannot be made liable for monies spent by the guardian for improving or developing it, as a borrowing for such purposes would *prima facie* be beyond the powers of a guardian and likely to endanger the corpus of the estate itself instead of preserving it.

S. 27 of the Guardian and Wards Act merely defines and regulates the duties between themselves of the guardian of the property and the minor and it cannot be construed so as to afford a direct relief to a person whose monies were borrowed and applied to a minor's estate by a guardian.

Ammalu Ammal v. *Namagiri Ammal*, (1917) 33 M.L.J. 631, relied on.

Where a guardian has authority to borrow he may well be invested with authority to keep the debt alive also and his acknowledging the debt on behalf of the ward will save limitation, the acknowledgment being by an 'agent duly authorised in this behalf' under S. 19 of the Limitation Act.

Annapagauda v. *Sangadigyapa*, (1901) I. L. R. 26 Bom. 221 (F. B.), distinguished.

Appeal against the decree of the Court of the Subordinate Judge of Nilgiris at Ootacamund dated 11th April, 1934 and passed in O.S. No. 74 of 1933.

Westmoreland Wood, G. Rajagopalan and *T. Srinivasan* for Appellant.

A. C. Sampath Aiyangar for Respondent.

The judgment of the Court was delivered by

Krishnaswami Aiyangar, J.

Krishnaswami Aiyangar, J.—This is an appeal by the plaintiff against the decree of the Subordinate Judge of the Nilgiris dismissing her suit, O. S. No. 74 of 1933. That suit was filed by her in her capacity as executrix to the will of her late husband, J. Lornie who had died on 19th May, 1933. Mr. Lornie appears to have been doing while alive, a business in tea and coffee. He had a tea factory of his own, and was also advancing monies to owners of tea and coffee estates, in order to obtain for the purposes of his business the produce of those estates. It is alleged in the plaint that he advanced in the first instance a sum of Rs. 15,000 to the defendant, a minor, on a promissory note executed on 17th November, 1924, by his mother, Kathijabai. Whether at the time she had been appointed guardian of the son is not known, though it is known she was in fact appointed the guardian of his person as well as his property some time in 1925. The money was advanced in order to enable her to discharge a debt of his father and also to run, improve and develop his Upper Yerragadu and Bygalony estates efficiently and so as to obtain a better return from them.

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A further sum of Rs. 200 was, it is alleged, advanced on 13th April, 1925, for the same purpose. At the end of June, 1925, the amount remaining due to the plaintiff's husband after giving credit for monies and goods received from the guardian was Rs. 10,953-5-0.

From the 4th July, 1925, onwards, he began, it is alleged, to make weekly advances for working, improving and developing the estates. These advances were mostly in sums of Rs. 200 or 250 and were made to the Manager of the estate one Yusuf Sait, a near relation of the minor appointed by and acting presumably under the instructions of the guardian. Kathijabai died on 5th August, 1925, and by order of the District Court, Coimbatore, dated 10th December, 1925, Hanifa Bee the sister of the minor was substituted in her place. This however made no difference in the dealings between Lornie and the minor's estate which continued on the old basis. Further advances were made and by 31st August, 1926, it was found that a sum of Rs. 24,912-13-0 was due by the defendant but this sum, it is pleaded in the plaint, was repaid by the subsequent payments and deliveries of produce. The account of the dealings which continued after that date resulted on a liability of Rs. 36,244-4-11, as up to 31st March, 1931. With subsequent interest it swelled to Rs. 46,895-7-6 by the date of the plaint and this was the amount claimed as due from the defendant together with further interest.

It is noteworthy that the promissory note referred to above which seems undoubtedly a good debt binding upon the minor is not founded upon in the plaint. The reason must be either the knowledge that a claim on the promissory note as such was barred by limitation or more probably the fear that it evidenced a personal obligation of the guardian not capable of being enforced against the minor or his estate. On its face it does not purport to have been made on behalf of the minor. Neither has any claim been made on the footing of necessaries supplied for the maintenance of the minor. The plaint proceeds entirely on the footing that the advances were made for the requirements of the estate and not for those of the minor.

On behalf of the minor defendant, the defence was entered by a third guardian, A. Rahim Sait appointed in place of Hanifa Bee after her removal from the office. In the written statement the defendant questions the right of Kathijabai to borrow on

behalf of the minor either as his natural, *de facto* or *de jure* guardian. It was pleaded that the advances to her as well as to Hanifa Bee were the result of an unauthorised arrangement between Lornie and Yusuf Sait for the benefit of the former and in order to secure for him exclusively, the entire produce of the minor's estates rather than in the interests of the minor. It was averred that the advances were unnecessary for working the estate and were not in fact applied for its benefit either. As regards Hanifa Bee it was also suggested that she did not take any part in the management of the estate at all, did not apply for or receive any advance from Lornie, and did not in fact authorise Yusuf to borrow from Lornie or for that matter from any other person. It was also pleaded that the claim was barred by limitation.

Two issues were tried by the learned Sub-Judge and they are:

(1) Are the borrowings by or advances to the defendant's guardian from the plaintiff's late husband true, and do they or any of them bind the defendant?

(2) Is the suit or any portion of the claim barred by limitation?

Recording a finding in the negative on the first and in the affirmative on the second of these issues the Subordinate Judge has dismissed the suit and hence the plaintiff has preferred the appeal.

The Subordinate Judge considered three questions under the first of the above issues. They were, whether the advances were in fact made, whether they were made to a person having authority to act, on behalf of the minor, and whether they were made for purposes binding on him. On a consideration of the evidence he came to the conclusion that the advances were true and though in fact made to Yusuf, they were made to him under circumstances which showed that he received them with the consent and approval of the duly appointed guardians. He accordingly held that the latter must be deemed to have made the borrowings. This finding by itself was not however enough for the plaintiff to succeed. For on the third and the most important point the learned Judge found against the plaintiff and this necessarily led to the dismissal of the suit. There can be no doubt, as the learned Judge has found, that the money or

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at any rate most of it was spent for some purpose or other connected with the person or estate of the minor. In the absence however of an averment in the plaint to the effect that any portion of the advances went towards the maintenance of the person of the minor, it is not permissible for the plaintiff after the conclusion of the trial in the lower Court, or in the appeal here to put forward a case of necessaries supplied to the minor for his education or support. In fact there is no evidence on the record on this point except that indicated by two items of expenditure shown in the administration accounts filed into Court by Hanifa Bee as guardian. In Ex. Q relating to the period from 1st April, 1928 to 31st March, 1929, a sum of Rs. 4,917-12-0 is shown as a disbursement for minor children, H-account and in Ex. R covering the period from 1st April, 1929 to 31st March, 1930, a further sum of Rs. 3,767-8-0 appears to have been spent for the minor and his sister's account. It is not possible, from these debits alone and in the absence of other evidence, to conclude that it was out of the advances made by Lornie that these two disbursements were in fact made, as we find that both these accounts exhibit other borrowings from other persons also from which the disbursements could have been made. Some correspondence has been made available to us in print, but it suggests clearly enough that whenever moneys were required, they were uniformly required for purposes connected with the estate and not for the maintenance of the minor. The learned Judge in the Court below is of opinion for the reasons given by him in his judgment, that the amounts spent on the minor according to the accounts were out of all proportion to the income from the estate. So they might well be. But we find it difficult to express any definite opinion one way or the other in view of the paucity of the evidence adduced. Whether any portion of the minor's necessary expenses came out of the advances made by the plaintiff's husband, and if so how much of those advances represent necessaries actually supplied for the personal needs of the minor are questions which could have been, but have not been explained by the evidence. They remain therefore in the region of mere speculation. In these circumstances we are unable to hold that any portion of the advances have been satisfactorily made out to have been made or utilised for the personal necessaries of the minor defendant.

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To the extent to which the advances are shown to have been made for the necessities of the minor's estate, a claim could of course be sustained provided the proof is sufficient, and the procedure, proper. The learned Judge has as we have said found in plaintiff's favour to this extent, namely, that the monies were all spent for some purpose or purposes connected with the estate. He has not however found that the borrowing was either reasonable or proper or necessary for the realisation, protection or benefit of the minor's property. In fact, the Subordinate Judge has held that no man of ordinary prudence would have made or accepted these large and in his opinion, unnecessary advances in the known circumstances of the minor's estate. He has instituted for a series of years a comparison between the yield from, and the expenditure on, the estate as disclosed by the accounts kept by Lornie, and has come to the conclusion that the expenses were disproportionate to the yield, and that there was a progressive increase noticeable in the liability from stage to stage under the guardians' management. He has also found that Lornie must have been fully aware of the growing weight of the indebtedness on the estate, on account of the advances which were large and incommensurate with the outturn, and that he must therefore have made them regardless of the interests of the minor. It appears to us that the conclusion that the advances were neither necessary nor beneficial to the minor is not unjustified. The evidence on this point has been canvassed before us in great detail. On the basis of the figures available in the accounts maintained by the appellant's husband it was urged that the estate has been appreciably benefited by the advances. So it may appear at first sight. A closer scrutiny however shows that though there was a general increase in the yield of tea during the period between 1925 and 1930, there was a distinct drop noticeable in 1931. No attempt has been made in the Court below to prove how much of the increase was due to natural causes, how much to human endeavour, and how much to the financial aid received during the period. The drop in 1931 supports the inference that no sooner were the advances reduced or stopped, the yield also began to fall in a marked degree. It looks as if the monies received from Lornie did not bring about any permanent improvement in the yielding capacity of the estate. The advantage which is noticeable in the earlier years appears to have been in the main, temporary and did not last

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beyond those years. The benefit, if any, cannot therefore be said to have been real or substantial. It is to be regretted that the defendant has not thought fit to assist the Court in the slightest degree. No accounts of the management were produced by the guardians, and no evidence at all adduced to throw light on the nature of their management. We are in fact left in the dark as to how the monies were spent. We do not even know whether any accounts were maintained by any of the guardians. The plaintiff's witnesses have not been able to say anything more than that the moneys were advanced for the purposes of the estate and in a general way spent on it. A further handicap has been added by the death of Lornie the only person who could have explained the situation. In these circumstances the attack of the defence that Lornie had acted in making the advances from motives of pure self-interest, and in utter disregard of that of the minor could not be and has not been seriously or sufficiently met. With his knowledge of such a business undertaking, and of the information which he must have obtained regarding the income and expenses of the estate it is unbelievable, it was urged for the respondent, that he advanced the monies with the intention of holding the estate liable, if he had known, as he must be presumed to have known, the limitations on the authority of a guardian to bind the minor's estate by incurring debts. It was therefore urged with considerable force that it must be a case of either reckless lending, or undue confidence in the integrity of the guardians and that it was highly probable that to the guardians alone and not to the estate did he look for payment. This is the question that has first to be determined. But before we do so we may observe that we cannot accept the argument of the respondent that Lornie dealt, and intended to deal not even with the guardians but, only with Yusuf personally in respect of the transactions under consideration. This is quite improbable as there is no reason for thinking that Lornie was ignorant of the existence of the minor, his ownership of the estate, or of the fact that Kathijabai and Hanifa Bee were his guardians in succession. The position of Yusuf as a manager functioning under the directions of the guardians must also have been well known to him. We can find nothing on the record to suggest that Yusuf was a person of means to whom large sums could have been advanced with any prospect of

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recovery. Even if he was, it is scarcely likely that Yusuf would have chosen to incur a personal liability for the sake of the minor, or that Lornie was so ignorant of the true state of facts as to regard Yusuf as the owner in spite of every one of his letters describing him as a mere manager.

The real question which has to be considered is whether as far as the lender is concerned he advanced the loans in dispute to the guardians in their personal capacity and looked to them alone for payment back, or whether he intended to secure for those advances the direct liability of the estate. On the part of the guardians, it is necessary to enquire whether they intended to bind themselves by a personal obligation with an ultimate indemnity to themselves out of the estate or whether they or either of them refrained from undertaking a personal obligation all along intending to make the estate and not themselves liable. A third alternative is not impossible, namely, that Lornie was so optimistic as to think that the entire advance would be repaid to him in the shape of the produce coming to him out of the estate for a sufficiently long period. This last must be at once dismissed as it rests on mere surmise unsupported by any basis in the evidence. The other two alternatives remain to be considered. It is to be observed that if the facts and circumstances make it clear that neither of the guardians did in fact deal with or purport to deal with or affect the minor's estate, whatever other remedy the lender may have, it is not open to him to proceed directly against the minor or his estate.

On a question of this kind the proposition to start from is that laid down in *Waghela Rajsanji* v. *Shekh Masludin*[1], namely, that a guardian cannot enter into a covenant or contract on behalf of the ward so as to impose a *'personal liability'* on the latter, the expression to be understood in this context, as including a liability of his estate as well. Their Lordships' observations are as follows:—

"Now it was most candidly stated by Mr. Mayne . . . . that there is not in Indian Law any rule which gives a guardian and manager greater power to bind the infant ward by a personal covenant than exists in English Law. In point of fact, the matter must be decided by equity and good conscience, generally interpreted to mean the rules of English Law if found applicable to Indian Society and circumstances. Their Lordships are not aware of any law in which the guardian has such a power nor do they see why it should be so in India They conceive that it would be a very improper thing to allow

1. (1887) L.R. 14 I.A. 89: I.L.R. 11 Bom. 551 at 561 (P.C.).

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the guardian to make covenants in the name of his ward, so as to impose a personal liability upon the ward, and they hold that in this case the guardian exceeded her powers so far as she purported to bind her ward and that so far as this suit is founded on the personal liability of the talukdar (*i.e.*, the minor) it must fail."

The effect of this passage is to deny to the guardian the authority to bind the minor by a personal contract. His right to charge or sell the estate or even a portion of it depends on other considerations, which it is unnecessary to advert to in the present case. The remedy of the creditor is ordinarily and except in exceptional cases, In re *Johnson*: *Shearman* v. *Robinson*[1], against the guardian personally though the latter could claim to be subrogated to the right of indemnity which the guardian himself might have in respect of moneys whether of his own or borrowed from others, which he had applied for those purposes of the estate which are permitted to him by law. This is by its very nature a limited right, depending on the state of the account between the guardian and the ward, and enforceable to the extent to which alone the guardian retains the indemnity unimpaired. In proper cases, and where the guardian is also impleaded as a party to the suit, the right of subrogation could apparently be worked out even in the same suit and without the necessity for a fresh one. (*Raybould* v. *Turner*[2], *Dowse* v. *Gorton*[3] and *Srishchandra Nandi* v. *Sudhirkrishna Banerji*[4].) Otherwise the best that the creditor can get in a suit like the present where he has sued the minor direct, without impleading the guardians also as parties, is a mere declaration that he is entitled to subrogation but not a decree executable against the minor's estate by process of execution.

The Privy Council has further elucidated the point in a later case. In *Indur Chunder Singh* v. *Radhakishore Ghose*[5], a minor was sued for arrears of rent due on a lease taken during his minority by his grandmother and mother the latter describing herself as the 'mother of the minor.' Though the issues raised in the trial Court involved the point whether the mother could bind the minor by contract, it was abandoned in the High Court and their Lordships observed 'that such a contention could not be sustained.' As to whether it could not be sustained by reason only of the abandonment, or on account of

1. (1880) 15 Ch. D. 548. 2. (1900) 1 Ch. 199.
3. (1891) A. C. 190. 4. (1931) I.L.R. 59 Cal. 216.
5. (1892) L.R. 19 I.A. 90: I.L.R. 19 Cal. 507 (P.C.).

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the rule of law on the point is not quite clear from the judgment, so far as we could see. About the end of the judgment, the following observations occur:

"But in the present case the mother and widow of Gopi Mohun Ghouse (father of the defendant) were not dealing with and did not *purport* to deal with or affect his estate, but were incurring new obligations which it is now sought to transfer from them to the estate. It may be that as between them and the infant, they might be able, in some circumstances to show that the estate ought to bear the burden they had taken upon themselves, but that is not the question raised in the case in which the plaintiffs seek to establish a direct relation between themselves and the estate of the infant, and a liability on the part of the infant now that he is of age, and of his estate, to fulfil the obligations entered into by the lessees (that is, the mother and the grandmother) in their own names."

The claim to proceed against the estate of the minor was thus negatived. Two propositions of law appear to follow from this decision. Where the promisee or lender dealt with a person who was in fact a guardian, but dealt with him in his or her personal capacity and gave him credit on that footing only, the remedy is against the guardian and the guardian alone. This was indeed the principle recognised in the previous case. Secondly, that no direct recourse is available against the minor or his estate and all that the creditor has, is merely an indirect remedy on the principle of subrogation. These two decisions of the highest tribunal sufficiently explain the true principle of law to be applied. It follows that even if the guardians in this case had incurred the debts for the necessary purposes of the minor's estate, this would not by itself entitle the creditor to obtain satisfaction from that estate direct, if his contract was with the guardian personally. It is true that the Hindu Law and to a lesser extent and under perhaps more stringent conditions even the Mohammadan Law, appears to contain exceptions which have the effect of mitigating the rigour of the rule of law as enunciated by the Privy Council. *Ramajogayya* v. *Jagannadham*[1] and *Imambandi* v. *Mutsaddi*[2]. But these exceptions are of no avail where the circumstances as in this case point unmistakably to the creditor having dealt personally with the guardians, and not on behalf of the estate. In this view we are obliged to hold that the plaintiff cannot get a remedy in this suit even if the evidence warrants a finding in her favour that the debts incurred were all proper and necessary for the defendant's estate.

1. (1918) 36 M.L.J. 29: I.L.R. 42 Mad. 185 (F.B.).
2. (1918) 35 M.L.J. 422: L.R. 45 I.A. 73: I.L.R. 45 Cal. 878 (P.C.).

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To start with, there is Ex. T the promissory note executed by Kathijabai the mother of the minor, on 17th November, 1924. Whether by that time she had been appointed guardian by Court is not, as we have already said, known. But it is significant that in this document which evidences the first and the largest single advance, Kathijabai describes herself as the widow of the minor's father, Haji Nur Mohammad Sait, and not as the mother or guardian of the minor who had by this time become the owner of the estate under the will of the father. She appears to have signed the promissory note also as Kathijabai *simpliciter*. Whether she wanted to ignore the will, with the intention of claiming for herself a share of the estate under Mohammadan Law it is impossible to say. But assuming that she was in fact holding at the time the position of a guardian, it is certainly singular that the promissory note which was accepted by Lornie should make no reference at all to the minor or to her guardianship. The form of the note is therefore definitely against the possibility of the parties to it having had any other liability in mind than that of the executant herself. We need not pause to consider whether the terms of the document notwithstanding, it is permissible for us to consider other circumstances in order to find out the true intention of the parties in this behalf. (Compare the observations of the Privy Council in *Firm of Sadasuk Janki Das* v. *Sir Kishan Pershad*[1], with the decisions in *Krishna Chettiar* v. *Nagamani Ammal*[2] and *Satyanarayana* v. *Mallayya*[3].) Assuming that we can take other facts and circumstances into account, even then it is difficult in this case to resist the inference that to the knowledge of Lornie it was the guardians alone that were contracting with him and that in their personal capacity. Reference may in this connection be made to his subsequent conduct which to our mind appears to support the same inference. After he began to deal with Kathijabai, he opened in his books a ledger folio for recording the transactions between him and her. That ledger was headed 'Kathijabai widow of Haji Nur Mohammad Sait, Coonoor'. The first transaction entered in it is the advance of Rs. 15,000, under the promissory notes. From that time onwards the accounts were throughout continued under the

1. (1918) 36 M.L.J. 429: L.R. 46 I.A. 33: I.L.R. 46 Cal. 663 at 669 (P.C.).
2. (1915) I.L.R. 39 Mad. 915 at 916.
3. (1934) 68 M.L.J. 540: I.L.R. 58 Mad. 735 (F.B.).

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same heading right down to the very end, *vide* Ex. D series, E series, F-1 and G-1 the last of these accounts bringing us down to April, 1933. Even the death of Kathijabai made no difference. For the name of Hanifa Beė is not found substituted in place of the deceased Kathijabai even after the latter's death. The entire absence of any reference to the minor in the accounts throughout the whole period of the dealings, is certainly a strong argument in support of the view that Lornie and the guardians dealt with each other on the footing that it was the latter alone that were regarded as the borrowers. As against the inference suggested by the promissory note and these accounts, our attention has not been called to any evidence oral or documentary tending the other way, that is, to establish that the guardians were not pledging their own credit, but only the credit of the estate in respect of these transactions. We are therefore constrained to hold that these transactions bound, and were intended to bind the guardians alone and not the estate.

We were anxious to find and afford, if we could, some remedy to the plaintiff whose husband had advanced as we have no doubt, considerable sums of money most of which were in all probability spent for some purpose or other connected with the estate. It is unfortunate that neither in the plaint nor in the evidence at the trial, has any attempt been made to allocate to and separate the purposes for which the loans had been utilised. As we have pointed in the opening paragraphs of this judgment, the plaint avers that the guardians borrowed the moneys to work, improve and develop the estates. We are not satisfied that the minor's estate could be made liable for monies spent for improving or developing it, as a borrowing for such purposes, would *prima facie* be beyond the powers of a guardian and likely to endanger the corpus of the estate itself instead of preserving it. No authority has been cited for such a wide proposition. Monies borrowed for the necessary upkeep of the estate, and in order to prevent it from deteriorating would of course stand on a different footing, and at one stage we were, though only tentatively, inclined to send down an issue to the lower Court for ascertaining on fresh evidence whether any allocation to this head of expenditure could be made, and if so to what extent. On further consideration however and in view of our conclusion that the guardians

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borrowed the monies in their personal capacity, we had to abandon the idea as on this view the further enquiry would be purposeless. Further the respondent has stoutly objected to this course, as tending to confer on the appellant an undue advantage and an unjustifiable opportunity to mend her case and fill in the gaps in it. We are unable to say that this is an aspect of the matter which could not have been reasonably anticipated by the plaintiff in the Court below, and we are therefore unable to direct a fresh enquiry on materials to be gathered and furnished at this late stage. We endeavoured also to see if S. 27 of the Guardians and Wards Act (VIII of 1890) could be so construed as to afford a direct relief to a person whose monies were borrowed and applied to a minor's estate by a guardian. This again turned out a blind alley. The section appears merely to define and regulate the duties as between themselves of the guardian of property and the minor, and there is nothing in its language to warrant our taking the view that it was intended to abrogate the well-known principles of the law on the point to which we have already referred. In this connection we may point out that S. 36 of the Trusts Act (II of 1882) which contains language similar to that used in S. 27 of the Guardians and Wards Act has not been understood to afford a direct remedy to the lender. As observed by Kumaraswami Sastri J., in *Ammalu Ammal* v. *Namagiri Ammal*[1], there does not appear to have been any case in which direct recourse has been permitted in the case of a trustee or executor, under the provisions of the Trust Act. Much less has there been any case where such a relief has been given where the lender has dealt with a guardian, without securing a charge or mortgage on the minor's property. The contrary is suggested by two decisions of the Bombay High Court, namely, *Maharana Shri Ranmalsingji* v. *Vadilal Vakhatchand*[2] and *Vishwanath Ganshet* v. *Raghunath Ganu*[3]. In saying this we do not mean in any way to say anything which affects the guardian's power to charge or sell the estate, which, as we have said, depends on other considerations to which we need not advert in this appeal.

There remains lastly the plea of limitation which has been accepted by the learned Subordinate Judge. As the plaintiff has

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1. (1917) 33 M.L.J. 631 at 641 and 642.
2. (1894) I.L.R. 20 Bom. 61.
3. A.I.R. 1938 Bom. 344.

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failed to make out her main claim it is perhaps unnecessary to deal with this point at length. We may however observe that whatever controversy there was as to the power of a guardian to acknowledge a debt on behalf of the ward, none could be urged after enactment of S. 21 (1) of the Limitation Act which has explained the expression "agent duly authorised in this behalf", occurring in S. 19 of the Act. Where a guardian has authority to borrow, he may well be invested with authority to keep the debt alive also. *Annapagauda* v. *Sangadigyapa*[1], referred to by the Judge was a decision rendered on the language of the statute of 1877, before the enactment of the new S. 21. This point was not, we may also say, seriously pressed by the respondent. What he did urge with a vehemence scarcely justified by the facts, was that the documents relied on as containing the necessary acknowledgments had not been legally proved. Those documents are the two statements of accounts already referred to, namely, Exs. Q and R filed by Hanifa Bee into Court in the guardianship proceedings in pursuance of her obligation as guardian. They were taken out of the records of the Court and marked for the plaintiff at the trial. They purport to be signed in vernacular by Hanifa Bee, but her signatures to these statements have not been identified. The fourth witness for plaintiff who referred to them in his evidence was apparently unacquainted with her signature, and could only verify the handwriting of Salay Mohammad who prepared the statements before they were submitted for Hanifabai's signature. Salay Mohammad is a relation of the minor and appears from the evidence to have also helped in the management of the estate. These facts raise a presumption in favour of their genuineness. Further these two statements are referred to in paragraphs 10 and 11 of the plaint as containing acknowledgments of liability by the guardian. The written statement in para. 14 does not deny their genuineness but only refutes her knowledge of the contents. The genuineness of these documents must therefore be deemed to have been admitted in the pleadings. This is sufficient to dispose of this objection. We must therefore overrule the plea of limitation.

In view of our findings, the appeal necessarily fails and has to be dismissed with costs. The defendant has thus succeeded,

1. (1901) I.L.R. 26 Bom. 221 (F.B.).

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but we cannot however help expressing our feeling that the result is due as much to the lack of appreciation of the relevant principles of law, on the part of the appellant, as to the astuteness of the defence.

B. V. V. Appeal dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE SOMAYYA.

Karibandi Veeranna .. *Appellant** (*Plaintiff*)

v.

Sripada Lakshmipathi Somayajulu and others .. *Respondents* (*Defendants Nos. 2, 1, 3 and 6, 5, 7 and 8*).

Veeranna v. Lakshmipathi Somayajulu.

Madras Estates Land Act (I of 1908), S. 107—Sale for arrears of rent—Conduct of sale by Revenue Inspector—Purchase by Village Munsif—Validity.

(The Village Munsif), a subordinate to the officer (the Revenue Inspector) conducting the sale for arrears of rent is prohibited by S. 107, Madras Estates Land Act from purchasing in the sale. The prohibition is not conditional but absolute.

Appeal under cl. 15 of the Letters Patent against the judgment of the Hon'ble Mr. Justice King in S. A. No. 122 of 1933 preferred against the decree of the Court of the Government Agent of East Godavari at Cocanada in A. S. No. 6 of 1931 (O. S. No. 40 of 1928, Court of the Assistant Agent, Bhadrachalam).

P. Somasundaram for Appellant.

G. Lakshmanna and *G. Chandrasekhara Sastri* for Respondents.

The judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—This appeal arises out of a suit filed in the Court of the Assistant Agent, Bhadrachalam, to set aside a sale of land under the Madras Estates Land Act for arrears of rent on the ground that there had been material irregularity and fraud in connection with the sale. The sale was conducted by the Revenue Inspector and the auction purchaser was the Village Munsif, the second respondent in this appeal. The property was bought in the joint names of the second respondent and the first respondent, who were defendants 1 and 2 in

* L. P. A. No. 24 of 1937. 7th February, 1939.

Veeranna v. Lakshmipathi Somayajulu.

Leach, C.J.

the suit. It was held by the trial Court that the first respondent was not in fact a purchaser but had merely lent his name to the second respondent. S. 107 of the Madras Estates Land Act, 1908, states that no officer holding a sale of property under the Act and no person employed by or subordinate to such officer shall either directly or indirectly bid for, acquire or attempt to acquire any interest in any property sold at a sale of this nature. The second respondent as the Village Munsif was a person subordinate to the officer conducting the sale. This was conceded in the Courts below. The Assistant Agent who tried the suit held that the sale was bad because this section had been infringed and for other irregularities. On appeal to the Government Agent. East Godawari, the decision of the trial Court was set aside and the sale confirmed.

A second appeal was preferred to this Court and was heard by King, J., who confirmed the decision of the first appellate Court on the ground that the case did not fall within the principle laid down in *Nugent* v. *Nugent*[1]. In *Nugent* v. *Nugent*[1], a receiver appointed by the Court to have charge of certain property purchased the property without the leave of the Court. It was held that the receiver being in a fiduciary position, having full knowledge and special opportunities of knowing the rentals of the property and the other circumstances, was just in that position which brings a case within the rule of the Court that a person in a fiduciary position having special means of knowledge, ought not to be allowed to buy or to bid for the property without the leave of the Court. The decision in *Nugent* v. *Nugent*[1] is not in point. What the Court has to consider is S. 107 and that section says that a subordinate to the officer conducting a sale shall not buy. A subordinate to the officer conducting the sale did buy and therefore the property was sold to a person who was prohibited by law from purchasing. The prohibition in the section is not conditional but absolute. In these circumstances the decision of the trial Court must be restored and the sale set aside. The appellant is entitled to his costs here and in the Courts below.

K. S. ——— *Appeal allowed.*

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1. (1908) 1 Ch. 546.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING.

Minor Varadarajam Pillai by guardian Malayaperumal Pillai .. *Appellant** *(3rd Respondent—Defendant 6)*

v.

Krishnamurthi Pillai .. *Respondent (Petitioner —Plaintiff).*

Varadarajam Pillai *v.* Krishnamurthi Pillai.

Civil Procedure Code (V of 1908), O. 34, r. 14—Applicability—Hindu joint family—Mortgage in favour of father—Promissory note in favour of sons—Attachment in execution of money decree.

It is only if the mortgagee and the decree-holder can be identified as the same person or the same legal entity that O. 34, r. 14, Civil Procedure Code, can come into play. Where a mortgage was executed in favour of the plaintiff's father and subsequently the mortgagor executed a promissory note to the plaintiff himself for the interest then due on the mortgage bond and later the plaintiff filed a suit and obtained a decree for the claim on the promissory note and thereafter brought an application in execution asking the Court to attach certain items of the mortgaged property.

Held, that O. 34, r. 14 of the Code was not applicable to the facts of the case.

Appeal against the order of the District Court of South Arcot dated 10th January, 1938, and made in A. S. No. 226 of 1937 preferred against the order of the Court of the District Munsif of Chidambaram dated 25th September, 1937 and made in E. P. R. No. 1048 of 1934 in O. S. No. 775 of 1932.

R. Desikan for Appellant.

M. Patanjali Sastri for Respondent.

The Court delivered the following

JUDGMENT.—The appellant here is the successor in interest of the mortgagor who on 1st September, 1926, executed a mortgage deed in favour of the plaintiff's father for Rs. 10,000. In 1932, the mortgagor executed a promissory note to the plaintiff himself for the interest then due upon the mortgage bond. Later in 1932, the plaintiff filed a suit and obtained a decree for the claim upon the promissory note and in 1934, he brought an application in execution asking the Court to attach 16 items of property of which all but the first two were the subject-matter of the mortgage. This claim was resisted by the appellant on the ground that O. 34, r. 14 applied. Both the

* A. A. A. O. No. 59 of 1938. 4th November, 1938.

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Courts below have held that O. 34, r. 14 does not apply to the facts of this case and this is the point for determination in this second appeal.

The rule in question runs as follows:

"Where a mortgagee has obtained a decree for payment of money in satisfaction of a claim arising under the mortgage, he shall not be entitled to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage. . . . . . ."

Of course if the rule be read literally, it will be seen at once that the appellant can have no case. The mortgagee in this case is one person and the decree-holder is another and it is obviously only if the mortgagee and the decree-holder can be identified as the same person or the same legal entity that O. 34, r. 14 can come into play. It has been strenuously argued that both the mortgagee and the decree-holder are in essence the joint family consisting of the father and the son, and that therefore the mortgagee and the decree-holder are identical, and then it is argued that the son can be described as the mortgagee as he has some interest in the mortgage or that the father can be described as the decree-holder because it is found as a fact that the promissory note was really taken benami for him. It seems to me impossible to accept any of these propositions. So far as the identity of the decree-holder is concerned, it is clearly impossible in the existing state of the law for the judgment-debtor to say that any one other than the person named in the decree is the decree-holder. The decree-holder therefore can only be the son. It seems to me equally impossible to say that the son is the mortgagee even though it may be that as a member of the joint family he has some rights in the mortgage. It is no doubt a plausible proposition to regard both the mortgagee and the decree-holder as really the joint family. But I have been shown no authority for the employment of such a legal fiction. For it is quite clear that the mortgagee as described in the mortgage is a single person and the decree-holder in the decree is also a single person. No doubt it has been held in connection with proceedings under S. 73 that a decree against the father to which the sons are not nominally parties is a decree against the sons and therefore that when two decrees are in question, one of which is definitely directed against the sons and one only against the father as manager of the joint family they can be held to be against the same judgment-debtor. On the other hand it seems to me that

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when we are dealing with contracts, the authority of the Privy Council in *Pichappa Chettiar* v. *Chockalingam Pillai*[1], is of more value for deciding whether the joint family as a unit can be considered a party to such contracts or not. Their Lordships of the Privy Council quoted with approval the passage from Mayne's Hindu Law in which it is stated that where the managing member of the joint family enters into a partnership with a stranger, the family as a unit does not become a partner. No doubt there may be some special circumstances depending on the law of partnership, but it seems to me a very reasonable extension of this dictum to say that where a mortgage is entered into by the manager of the joint Hindu family, the son does not thereby become the mortgagee and similarly where the son obtains a decree, his father does not thereby become the decree-holder; nor can the family as a unit be said, in my opinion, to have entered into either transaction. The learned counsel for the appellant here, though his argument seems to be plausible in the sense that if a decision be given against him, the main purpose of O. 34, r. 14 may on the facts of this case have been frustrated, has not been able to adduce any authority in support of his view and in my opinion it requires too many assumptions and a resort to too violent a legal fiction to accept it. I see no sufficient reason for differing from the finding of the learned judges in the Courts below and must dismiss the appeal with costs.

It seems to me however reasonable to make one concession on behalf of the appellant here and that is with regard to the order in which the items are to be sold. Items 1 and 2 must be sold first and only if the amount fetched by those items is insufficient to pay off the decree debt will it be permitted to sell the remaining items. This concession does not prevent the sale of all the items being proclaimed for and if necessary carried out on the same day.

Leave to appeal is granted.

B. V. V. ——— *Appeal dismissed.*

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1. (1934) 67 M.L.J. 366 (P.C.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Cherutty *alias* Vasu (minor) and another .. *Appellants** (*Plaintiffs 3 and 4*)

v.

Nagamparambil Raru *alias* Kuttaman and others .. *Respondents* (*Defendants 1 to 9*).

Cherutty *v.* Nagamparambil Raru

Hindu Law—Maintenance—Right of minor son and daughter—Mode of enforcement—Suit for maintenance or partition—Claim of daughter through father.

A minor coparcener who has been denied maintenance and wishes to claim maintenance should bring his suit in the alternative claiming partition or maintenance as the Court thinks fit, unless his guardian decides to adopt the usual form of a suit claiming partition in the property.

The proper course for a daughter to adopt if, during the lifetime of her father, she has been denied maintenance, is not to bring a suit for maintenance against the manager of the joint family, but to bring a suit against her father claiming maintenance out of his properties joint and separate. After she has got her decree, she may, if necessary, enforce it by the sale of her father's share in the joint family properties.

Appeal against the decree of the Court of the Subordinate Judge of South Malabar at Calicut in A. S. No. 176 of 1931 (Appeal No. 398 of 1931, District Court, South Malabar) preferred against the decree of the Court of the District Munsif of Vayitri at Calicut in O. S. No. 77 of 1930 (O. S. No. 600 of 1929, District Munsif's Court, Calicut).

K. P. Ramakrishna Aiyar for Appellants.

K. Subramanyam for Respondents.

The Court delivered the following

JUDGMENT.—This appeal arises out of a suit brought by the first plaintiff, his wife (the second plaintiff) his son (the third plaintiff) and his daughter (the fourth plaintiff) against the defendants who represent a collateral branch of the same family, claiming arrears of maintenance, on the basis that the family is undivided. The lower appellate Court, though it expressed a very strong opinion that the family was not undivided, unfortunately gave no finding on the subject and the whole suit was dismissed on the ground that a coparcener cannot claim maintenance but should sue for partition. This decision overlooks the fact that neither the second plaintiff nor the fourth plaintiff are

*S. A. No. 968 of 1934. 24th October, 1938.

Cherutty v. Nagamparambil Raru.

coparceners, one being the wife and the other the daughter of a coparcener. There is no appeal by the first and second plaintiffs. The appeal is preferred only by the third plaintiff (the son) and the fourth plaintiff (the daughter).

The contention in appeal based on the observations of the Privy Council in *Rama Rao* v. *Rajah of Pittapur*[1] is that the son is entitled to be maintained out of the joint family property because he is a coparcener and that the daughter is entitled to be maintained out of the joint family property because she is a female member of the family whom the family is obliged to maintain until her marriage. The grounds on which the claim is made are therefore different in the case of the son from those in the case of the daughter. As to the claim of the son, it is, I think, undoubtedly the ordinary rule that a coparcener cannot claim maintenance if he is entitled to claim partition. Objection has been taken on the ground that the authorities quoted in the text books in support of this proposition are all Bombay authorities. But the proposition is stated both by Mr. Mayne and Sir Dinshaw Mulla in general terms and no Madras authority to the contrary has been quoted before me.

Mr. Ramakrishna Aiyar has quoted two Lahore cases, one which is that of *Bhagwan Singh* v. *Mst. Kewal Kaur*[2], where a widow claiming maintenance for herself and her minor son and daughter was given a decree against the assets of the joint family, comprising a certain allowance for the widow and an additional sum for each of the minor children. In this case, the learned Judges did not consider the question whether the minor boy should or should not have brought a suit for partition and the fact that he had rights as a coparcener as distinct from his rights as a minor entitled to maintenance is not referred to. The other case quoted is that of *Ramdas* v. *Leachman Das*[3], which was a case in which two grandsons sued their grandfather for maintenance during the lifetime of their father. It was observed that the grandfather's liability for maintenance arose only owing to the possession of joint family properties in his hands. This was of importance as affecting the question of jurisdiction which was the question actually decided in that case and no decision was given on the merits of the suit which was remanded for disposal in the light of the decision on the

1. (1918) 35 M.L.J. 392: L.R. 45 I.A. 148: I.L.R. 41 Mad. 778 at 784 (P.C.).
2. (1927) I.L.R. 8 Lah. 360.
3. A.I.R. 1936 Lah. 853.

jurisdiction question. I do not think this case can be treated as an authority for the proposition that the sons can get a decree for maintenance against the manager of the family during the lifetime of their father without claiming a partition. The argument which has the greatest force with reference to the claim of the son rests on the fact that the minor son's right to claim partition is not an absolute right, whereas he has an absolute right to be maintained out of the family property—at any rate, to the extent of his share; and it is argued that if he can claim partition only in circumstances which make it necessary to divide the family property in his interests, there would be no remedy for the refusal of maintenance in circumstances which do not make the partition desirable in his interests. I do not think it necessary for me for the purpose of the present case to lay down that in no circumstances could a Court give a decree for maintenance against the family properties in favour of the minor coparcener. But it does appear to me that in the vast majority of cases where the circumstances would justify a decree for maintenance, they would also justify a decree for partition and it should, in my opinion, be open to the Court to pass that decree which the Court thinks best in the interests of the minor whose rights have been denied. From this, it seems to me to follow that a minor coparcener who has been denied maintenance and wishes to claim maintenance should bring his suit in the alternative claiming partition or maintenance as the Court thinks fit, unless his guardian decides to adopt the usual form of a suit claiming partition in the property. I doubt very much whether a minor coparcener has a right to claim maintenance without at least putting it within the power of the Court to give the ordinary relief of partition should the Court think fit. It seems to me obvious that a claim for separate maintenance by a coparcener without any partition is likely to lead to great complications in any subsequent working out of his right to partition.

With reference to the claim of the daughter, I doubt very much whether the daughter during the lifetime of her father is entitled to bring a suit directly against the manager of the joint family property, ignoring the fact that the primary responsibility for her maintenance is upon the father and his properties, both joint and separate. In the present case, we have the curious position of the father and the daughter joining together

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to sue the manager for the daughter's maintenance. A daughter whose father is a member of a joint Hindu family has a right to be maintained by her father and out of his share in the joint family property. To allow her to get a decree directly against the manager of the joint family property would, in my opinion, be to create a situation which would almost certainly lead to complications and probably to injustice. Her maintenance would have to be charged on a particular item. That item might well be sold in execution of her decree. If that were done, would the father be allowed at a subsequent partition to take his full share of the balance of the joint family properties, ignoring the fact that one item had been taken away to satisfy a liability which is primarily his own. It is suggested that a decree could be given and the charge could be made subject to a proviso that if it were realised, the item of property sold should be treated as part of the share of the father. It does not seem to me practicable to make any such provision which would have the effect of attempting a partial partition. It seems to me that the proper course for a daughter to adopt if, during the lifetime of her father, she has been denied maintenance, is not to bring a suit for maintenance against the manager of the joint family, but to bring a suit against her father claiming maintenance out of his properties, joint and separate. After she has got her decree, she may, if necessary, enforce it by the sale of her father's share in the joint family properties. This would presumably lead to a proper partition in which the rights of each branch of the family could be equitably worked out. Seeing that the daughter's right is primarily against her father's share and that is a right which is derived from him, I do not consider that she should be allowed to bring a suit directly against the person in charge of the family properties, instead of proceeding against the person who is primarily responsible for her maintenance and whose share in the family properties is ultimately liable.

In the result, therefore, I dismiss the appeal with costs.

Leave to appeal granted.

B. V. V. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ABDUR RAHMAN.

Chidambaram Chettiar, son of Ponnayyan Chettiar and another .. *Appellants** (*Defendants*)

v.

R. A. S. Ramaswami Chettiar and another .. *Respondents* (*Plaintiffs*).

Chidambaram Chettiar *v.* Ramaswami Chettiar.

Civil Procedure Code (V of 1908), S. 35 and O. 34, r. 10—Suit to enforce mortgage—Order regarding costs—Discretion of Court—Applicability of S. 35—Mortgagee deprived of costs—Right to prefer appeal.

In a suit under O. 34, Civil Procedure Code, to enforce a mortgage, unless the mortgagee is found to be disentitled by his conduct from recovering his costs he would be able to claim as of right that the costs of his suit should be added to the mortgage money which is found by the Court to be due to him And a mortgagee who has been deprived of his costs by the decision of a Court would be entitled as of right to appeal to a higher tribunal.

The provisions contained in S. 35, Civil Procedure Code, are applicable to mortgage suits to which those stated in O. 34, r. 10 of the Code apply.

Sital Das v. *Punjab and Sind Bank, Ltd., Lyallpur,* (1935) I.L.R. 17 Lah. 520, not followed.

Cotterell v. *Stratton,* (1873) 8 Ch. App. 295 and *Charles* v. *Jones,* (1886) 33 Ch. D. 80, referred to.

Appeals against the decrees of the District Court of Madura in A. S. Nos. 151 and 120 of 1933, preferred against the decree of the Court of the District Munsif of Madura Town in O. S. No. 431 of 1932.

K. V. Sesha Aiyangar and *N. Rajagopala Aiyangar* for Appellants.

K. Rajah Aiyar for Respondents.

The Court delivered the following

JUDGMENT.—These are two connected second appeals and relate to costs. They arise out of a suit for redemption filed by one Ramaswami Chettiar in the following circumstances. Originally the eastern portion of a house belonged to one Karuppanna Asari and the western portion to Sundaram Asari. Karuppanna Asari appears to have died before 1918 and a deed of usufructuary mortgage was executed by Sundaram and Karuppannan's heirs in respect of the whole of the house on 13th April, 1938 (Ex. B) for a sum of Rs. 1,200, in favour of defendant 1 who, along with an undivided brother of his,

* S. A. Nos. 853 and 896 of 1934. 30th September, 1938.

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defendant 2 in this case, executed a simple mortgage of several properties including the sub-mortgage of the abovementioned house in favour of the third defendant in July, 1923 (Ex. I). On 11th May, 1932, Karuppannan's heirs sold the eastern portion of the house to the plaintiff under the sale-deed (Ex. A) and left a sum of Rs. 600 out of the sale price to be paid towards the mortgage executed in favour of the first defendant in 1918. Sundaram Asari had died in the meantime and his heirs executed a usufructuary mortgage on 29th May, 1932, in favour of the plaintiff (Ex. C) and left a sum of Rs. 600 with him for payment to the first and the second defendants. Since the first and second defendants had to surrender possession of the house to the plaintiff on account of the sale and the usufructuary mortgage, they did so in June, 1932, and executed a rental agreement in favour of the plaintiff. Soon after this, the plaintiff tendered a sum of Rs. 1,200 to the first and second defendants in the first instance and then at their request to the third defendant who refused to accept the same. On 10th September, 1932, the plaintiff filed a petition under S. 83 of the Transfer of Property Act and deposited Rs. 1,200 in Court in full satisfaction of the money due to the first and the second defendants or their mortgagee, the third defendant. The first two defendants did not contest the petition but the third defendant did and objected to receive the money in full satisfaction of his claim in respect of the house which had been, as stated above, partly purchased by and partly mortgaged under Ex. A and Ex. C with the plaintiff in May, 1932. The petition was therefore dismissed. The plaintiff then filed the present suit for redemption. No appearance was put in the case by the first and the second defendants but the third defendant raised several defences which failed and the trial Court passed a decree for redemption directing that the sum of Rs. 1,200, which had been deposited by the plaintiff in Court in proceedings taken by him under S. 83, Transfer of Property Act, be paid to the third defendant; but the first and second defendants who had remained *ex parte* were ordered to pay the costs of the suit to the plaintiff, while the third defendant was ordered to bear his own costs. The first and second defendants then filed an appeal to the Court of the District Judge of Madura who ordered that the costs should have been awarded jointly against defendants 1 to 3 leaving it to the plaintiff to recover them from any

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defendant that he liked. Against this decision of the learned District Judge two second appeals have been filed in this Court. In S. A. No. 896 of 1934 the first and the second defendants contend that they should not have been ordered to pay the costs of the suit to the plaintiff, while in the other (S. A. No. 853 of 1934) the third defendant claimed that no costs should have been awarded against him but that the lower appellate Court should have directed the plaintiff to pay his costs.

The first question which is to be decided in these appeals relates to their competency.

In ordinary cases an appeal for costs will only lie

(*a*) when a question of principle is involved;

(*b*) when the discretion has not been judicially exercised; or

(*c*) when the order has been passed in consequence of some misapprehension of law or fact.

Relying on these principles it was argued that the costs of the suit being in the discretion of the Court the Court had full power to determine by whom they were to be paid and the order being of a discretionary nature can, or at least should, not be interfered with in second appeals. A decision by a division bench of the Lahore High Court in *Sital Das* v. *Punjab and Sind Bank, Ltd., Lyallpur*[1], was cited in which it was held on appeal from a suit brought to enforce a mortgage that the Court had an absolute discretion in the matter of costs under S. 35, Civil Procedure Code, and that there was no principle of law which made it wrong or improper for a Court to saddle the real contesting defendants to a suit with costs. It has been contended that this may be true of cases which do not fall within the provision of O. 34 of the Civil Procedure Code, but the cases which fall within the scope of that order must be decided in accordance with the rule embodied in O. 34, r. 10. This rule provides that in finally adjusting the amount to be paid to a mortgagee in a suit for redemption, the Court shall ordinarily add the costs of the suit to the mortgage money unless the conduct of the mortgagee has been such as to disentitle him thereto. It was therefore urged that the Lahore case was not correctly decided and that in a suit under O. 34 the Court was bound to add the costs of the suit to the mortgage money when adjusting the amount to be paid to the mortgagee,

1. (1935) I.L.R. 17 Lah. 520.

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unless his conduct had been such as to disentitle him from recovering them.

There is considerable force in this argument, particularly as I find that the opening words used in S. 35, Civil Procedure Code, lend support to the argument now advanced before me and the learned Judges' attention does not appear to have been drawn in that case to the provisions of O. 34, r. 10, Civil Procedure Code. Learned Counsel for the appellant referred to O. 65, r. 1 of the Supreme Court Rules on which the present legislation was founded and which lays down that costs of all proceedings in the Supreme Court shall be in the discretion of the Court but nothing in those rules shall deprive a mortgagee who has not unreasonably instituted or carried on or resisted any proceedings of any right to costs to which he would be entitled according to the rules hitherto acted upon in the Chancery Division. Two English cases were also cited in support of this contention. It was held in *Cotterell* v. *Stratton*[1], that the right of a mortgagee in a suit for redemption to the general costs of suit is well established unless he has forfeited the same by some improper defence or other misconduct and does not rest upon the exercise of a discretion by the Court. The other case was that of *Charles* v. *Jones*[2], in which it was held by Lopes, L.J., that the mortgagee had an absolute right to costs unless they were forfeited by his misconduct and the matter was within the discretion of the Judge only when they were forfeited by his misconduct. I would therefore assent to the general propositions urged before me, (1) that unless a mortgagee is found to be disentitled by his conduct from recovering his costs, he would be able to claim as of right that costs of his suit be added to the mortgage money which is found by the Court to be due to him; (2) that in cases covered by O. 34, a mortgagee who has been deprived of his costs by the decision of a Court would be entitled as of right to appeal to a higher tribunal; and (3) that the provisions contained in S. 35, Civil Procedure Code, are inapplicable to mortgage suits to which those stated specifically in O. 34, r. 10 apply.

Coming to the facts of this case it was contended on behalf of the first and the second defendants in their appeal (S. A. No. 896 of 1934) that the award of costs by the lower Court

1. (1873) 8 Ch. App. 295. 2. (1886) 33 Ch. D. 80.

against them was wholly unwarranted inasmuch as no misconduct of theirs was either shown or even alleged which would have entitled it to award costs against them. Having gone through the facts of the case I find that the conduct of the first and the second defendants has been entirely free from blame. They did not even care to defend the action for redemption to which they were impleaded as necessary parties and an order by the Court awarding costs against them cannot be, in the circumstances, justified. Their appeal is therefore accepted.

As for the second appeal (S.A. No. 853 of 1934) the third defendant also contends that the order of the lower appellate Court directing costs to be paid by him to the plaintiff was incorrect. As I have stated above, this defendant had filed a written statement in which he had not only urged that the amount deposited by the plaintiff was insufficient but had also raised a plea of collusion alleged to have been existing between the plaintiff on the one hand and the defendants 1 and 2 on the other. This was a frivolous plea and was not substantiated by him. His conduct has in resisting the petition under S. 83, Transfer of Property Act and in defending the suit filed for redemption later, been such as to disentitle him from getting any costs in the action and I cannot hold that the award of costs against him by the lower appellate Court was in the circumstances improper. The result is that S.A. No. 896 of 1934 would be accepted to the extent that the order awarding costs against them by the trial Court and the lower appellate Court will be set aside, but S. A. No. 853 of 1934 will be dismissed with the result that the plaintiff would be entitled to recover his costs from this defendant only. The successful parties will be entitled to their costs in this and in the lower appellate Court.

B. V. V.

S. A. No. 896 of 1934 allowed,
S.A. No. 853 of 1934 dismissed,

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VARADACHARIAR AND MR. JUSTICE PANDRANG ROW.

Pachigolla Satyanarayanamurthy .. *Appellant** (*Plaintiff*)

v.

Chavala Gangayya and others .. *Respondents* (*Defendants 1 to 8*).

Satyanarayanamurthy v. Gangayya.

Transfer of Property Act (IV of 1882), S. 70—Accession—Mortgage of building and machinery fixed up in a leasehold site—New machinery set up on the site—If "accession" to the security—English law of fixtures—Applicability.

A person took a site on lease for a term of 12 years to construct a building thereon for a rice mill. He executed a mortgage which comprised *inter alia* the building which was being constructed on the site and some specified machinery. The leasehold site was not, however, comprised in the security. Subsequently another system of machinery was set up in the site and was fixed in the earth. It was connected by a belt with the pre-existing engine for the purpose of working. Both systems of machinery could be separated by merely removing the belt.

Held, that the parties intended to deal with the machinery independently of the building and only as movable property. The rule of English law relating to fixtures was not applicable to the case. The new machinery brought to the building could not be treated as an "accession" within the meaning of S. 70 of the Transfer of Property Act and did not become part of the security.

Appeal against the decree of the Court of the Subordinate Judge of Amalapuram in O. S. No. 36 of 1932.

G. Lakshmanna and *G. Chandrasekara Sastri* for Appellant.

P. V. Rajamannar and *K. Subba Rao* for Respondents.

The judgment of the Court was delivered by

Varadachariar, J.

Varadachariar, J.—This appeal arises out of a suit for the recovery of money due under certain mortgages executed by defendants 1 and 2 in favour of the plaintiff between June 1927 and June 1928—Exs. A to D series. Defendants 3, 5 and 7 are the contesting defendants and the dispute between the plaintiff and the defendants relates to the extent of the property comprised in the mortgages in plaintiff's favour.

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* Appeal No. 1°0 of 1934 21st September, 1938.

Satya-narayana-murthy v. Gangayya. — Varada-chariar, J.

The plaintiff's mortgages comprise properties described in three Schedules A, B and C. Schedule A relates to certain house property with which we are not concerned. Schedule B refers to a tiled building which was being constructed on a site belonging to Gangachalam and others and purports to pass the walls, beams, door frames, etc., of the building. From the body of Ex. A it will be seen that this site had been taken on lease for a period of 12 years for the purpose of constructing a building thereon for a rice mill. Schedule C comprises an engine which is said to be known by the name of Sree Kanaka-durga Rice Mill and the various parts of the machinery pertaining to the engine or to the Huller which was then intended to be set up to work with the help of the engine. The concluding words of the C Schedule refer to all *samans* connected with the rice mill and other *samans* necessary to fit up the mill and the Huller and all accessories. There is also a clause to the effect that if the mill should be fitted up in some other place, the property should nevertheless continue to be under the mortgage. It is admitted that for some time the concern was working only as a Huller. In the latter part of 1928, the mortgagors decided to work as a Sheller also with the power derived from the engine. For purchasing the Sheller and for incidental purposes, they borrowed moneys from defendants 3, 5, 7 and certain others under Exs. I and II in July and November, 1928. In due course, the Sheller was also set up in the shed that had already been constructed and the third defendant admits in his deposition that the Sheller system was fixed in the earth, that it was connected by a belt with the Huller system and that power from the same engine was used for working both the systems. It also appears from the evidence that the Sheller system can be separated from the Huller system merely by removing the belt and that for accounts purposes, the two systems are kept distinct. On the above facts, the question for determination is whether the plaintiff can claim that the machinery pertaining to the Sheller system is also comprised in his security. The learned Subordinate Judge has held that it is not. The plaintiff has appealed and contends that it should be held to be included in the security.

In support of the appellant's contention, Mr. Lakshmanna relied on S. 70 of the Transfer of Property Act and the decisions in *Bank of Upper India* v. *The Administrator-General of*

Satyanarayanamurthy v. Gangayya. — Varadachariar, J.

Bengal[1], *R. M. P. M. Chettiar Firm* v. *Siemens (India), Ltd.*[2], *Punjab and Sind Bank* v. *Kishen Singh-Gulab Singh*[3] and *Nannu Mal* v. *Ram Chandra*[4]. It does not seem to us necessary for the purpose of this case to consider whether and how far the rules of the English law governing fixtures are to be followed in this country. It is sufficient to say that in respect of particular species of transfers, the Legislature has made express provisions in the Transfer of Property Act, *see* for instance S. 8 and S. 108, cl. (*h*). We are prepared to assume that in certain circumstances, machinery existing in the mortgaged premises on the date of the mortgage and even machinery subsequently installed there may pass under a mortgage of the premises. But the question will, in our opinion, have to be determined in each case in the light of various facts. It may not be possible always to treat machinery brought into a building as an "accession" within the meaning of Ss. 63 and 70 of the Transfer of Property Act. It may in some cases become necessary to consider how far the definition of the expression "attached to the earth" in S. 3 of the Transfer of Property Act will bear upon the decision of this question. According to cl. (*c*) of that definition, what is attached must be attached for the permanent beneficial enjoyment of that to which it is attached.

In the present case, we are of opinion that there is no scope for the application of the rule relating to fixtures or of the principle enunciated in S. 70 of the Transfer of Property Act, because we are not satisfied that the site to which the Sheller system of machinery is said to be attached, is comprised in the mortgages to the plaintiff. It also appears to us that on the construction of the mortgage deeds, the machinery specified in Schedule C was mortgaged not as part of or as passing with the immovable preperty but independently and as movable property. Schedule B to the mortgage deed refers only to the building that was then under construction; and while it specifies in elaborate detail the various parts of the structure of the building, it significantly omits to refer to the site. This does not seem to us an accidental omission; it is apparently explained by the fact that the site itself was held by the mortgagor only

1. (1917) I.L.R. 45 Cal. 653.
2. (1933) I.L.R. 11 Rang. 322.
3. (1934) I.L.R. 16 Lah. 881.
4. (1930) I.L.R. 53 All. 334 (F.B.).

for a term of 12 years. That the machinery was dealt with independently of the building is also shown by the provision at the end of Schedule C that even if the machinery should be removed from this building and be fitted up elsewhere, the machinery should nevertheless continue subject to the mortgage. If, as we have held, the leasehold site is not comprised in the plaintiff's security, it would follow that the Sheller system machinery would not become part of the security merely by its having been subsequently fixed up on the site. Even if a different view should be taken as to the scope of Schedule B, we feel no doubt that the parties intended to deal with the machinery independently of the building and only as movable property. Reference is no doubt made in Schedule C to the mill and the arguments before us have been urged as if the word "mill" means the whole premises including the machinery. But it is obvious from the way in which the description is set out in Schedule C that the documents use the word "mill" as referring only to the engine and not as referring to the whole premises. The mere fact that the Sheller system is connected by a belt with the pre-existing Huller system or worked by power derived from the pre-existing engine will not of itself suffice to bring the Sheller system within the security created by Exs. A to D nor attract to the Sheller system the principles of the English law relating to fixtures—see *Northern Press and Engineering Co.* v. *Shepherd*[1].

The appeal fails and is dismissed with costs of respondents 3, 5 and 7.

K.C. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO.

S. V. Subba Rao .. *Appellant** (*3rd Respondent*)

v.

The Calicut Co-operative Urban Bank, Ltd. .. *Respondent* (*Petitioner*).

Subba Rao v. Calicut Co-operative Urban Bank, Ltd.

Co-operative Societies Act (II of 1912), S. 51—Award under—Application to Court for enforcement of—Limitation Act (IX of 1908), 2nd Schedule, Art. 182—Applicability.

The award of the Registrar under S. 51 of the Act is given the same status as a decree of a Civil Court for the limited purpose of execution and

1. 52 Solicitors' Journal 715.

* A. A. A. O. No. 2 of 1938. 12th April, 1938.

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the law relating to enforcement of decrees of such Courts including the law of limitation will apply by necessary implication.

Art. 182 of the second schedule of the Limitation Act would apply to the enforcement of an award passed by the Registrar of Co-operative Societies under S. 51 of the Co-operative Societies Act by a Civil Court other than a High Court.

Co-operative Credit Society v. *Chinnaswami Udayan*, (1936) 71 M.L.J. 759: I L.R. (1937) Mad. 495, dissented from.

Appeal against the order of the District Court of South Malabar dated 13th December, 1937, and made in A.S. No. 175 of 1937 preferred against the order of the Court of the District Munsiff of Calicut dated 11th June, 1937, and made in E. P. No. 5320 of 1936 (A.R.C. No. 394 of 1931-1932).

N. R. Sesha Aiyar for Appellant.

K. Kuttikrishna Menon for Respondent.

The Court delivered the following

JUDGMENT.—The question raised in this appeal is as to the proper article of the Limitation Act for an application for the enforcement of an award passed by the Registrar of Co-operative Societies under S. 51 of the Act.

The execution application in this case, out of which this appeal arises, was made in 1936 in respect of an award which was passed on 15th July, 1931. The first application for enforcement of the award made to the District Munsiff of Calicut was made in 1932 and between 1932 and 1936 there were other applications made for its enforcement. It is conceded that if Art. 182 of the Limitation Act applies, there is no bar of limitation. Both the lower Courts have taken the view that Art. 182 is applicable and held that the application is not barred by limitation. But it is contended by Mr. Sesha Aiyar that this view is wrong and that the article applicable is Art. 181 of the Limitation Act. He places considerable reliance on the decision of Cornish, J., in the *Co-operative Credit Society* v. *Chinnaswami Udayan*[1]. With due respect, I am unable to agree with the said decision. Under S. 65 of the Co-operative Societies Act, the Local Government is empowered to make rules to carry out all or any of the purposes of the Act and one of such purposes is the enforcement of decisions or awards in proceedings before the Registrar of Co-operative Societies. The rule which has been enacted in pursuance of this section is r. 15, cl. 7. Cl. 7 contains three sub-clauses

1. (1936) 71 M.L.J. 759: I.L.R. (1937) Mad. 495.

Subba Rao v. Calicut Co-operative Urban Bank, Ltd.

providing three methods of enforcement and the sub-clause, which is relevant for the purpose of the present discussion, is sub-clause (*c*) which runs thus:

"On application to the Civil Court having jurisdiction over the subject-matter of the decision or award, that Court shall enforce the decision or award as if it were a final decree of the Court."

If therefore an application to enforce an award is made to a Civil Court, for the purpose of enforcement the legislature enacts that it should be treated as a final decree of that Court. Thus by statute the award of the Registrar under S. 51 of the Act is given the same status as a decree of a Civil Court for the limited purpose of execution and the provisions of law relating to the enforcement of decrees of such Courts including the law of limitation applicable for such enforcement will apply by necessary implication. So when the question of limitation arises as to the enforcement of an award of the Registrar of a Co-operative Society, the Court before which the application for its enforcement is made will have to apply the article applicable for the enforcement of the final decree of that Court. In this case, the article applicable for the enforcement of the final decree of the Court of the District Munsiff of Calicut is Art. 182. *Prima facie* therefore the article that should govern the present case is Art. 182. In *Belvedere Jute Mills, Ltd.*, In re[1], a question arose as to the enforcement of an award under S. 15 of the Indian Arbitration Act where the language is almost similar. S. 15 runs thus:

"An award on a submission, on being filed in the Court in accordance with the foregoing provisions, shall (unless the Court remits it to the reconsideration of the arbitrators or umpire, or sets it aside) be enforceable as if it were a decree of the Court."

Rankin, C.J., and Mitter, J., held that Art. 181 would not apply to the case but the article applicable was Art. 183, the article applicable to the enforcement of the decree of the High Court. Rankin, C.J., in the course of the judgment remarked thus:

"If one looks at the question of limitation from the point of view of the different alternatives, there can be one inference only and that is that the words employed by the legislature in the first sub-section of S. 15 of the Indian Arbitration Act were intended to go to the question of limitation as well as to the question of procedure."

This decision was followed in our High Court by the learned Chief Justice and King, J., in the *Hindu Religious*

1. (1927) 31 C.W.N. 1097.

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Endowments Board, Madras v. *Shirur Mutt*[1]. There the question arose whether Art. 181 or Art. 182 is to be applied in regard to the application for the enforcement of an order passed by the Hindu Religious Endowments Board under S. 70 (2) of the Act which ran thus:

"The Court shall, on the application of the President of the Board . . . . recover the amount as if a decree had been passed for the amount by the Court against the religious endowment concerned."

The learned judges referred to *Lakshmindra Tirta Swamiar* v. *Hindu Religious Endowments Board, Madras*[2], where it was held that the words "as if a decree had been passed" attract to the order the whole procedure in execution and followed the ruling in *Belvedere Jute Mills Ltd.*, In re[3], and applied Art. 182. In my opinion the above decisions lay down the correct principle. I therefore hold that Art. 182 of the 2nd Schedule to the Limitation Act would apply to the enforcement of an award passed by the Registrar of Co-operative Societies under S. 51 of the Act by a Civil Court other than a High Court.

I shall now deal with the decisions relied on by Mr. Sesha Aiyar. The first case relied on by him is *Co-operative Credit Society* v. *Chinnaswami Udayan*[4]. On a perusal of the said decision, it looks as if it was assumed that Art. 181 applied to the case and the only question was whether the application was time barred. This appears clear from the following observations of the learned Judge in that case:—

"The only question in this appeal is whether the application is time barred. Admittedly it is, if Art. 181 of the Limitation Act governs it. But the argument is that the application not being one under the Civil Procedure Code, the Limitation Act has no application."

The learned Judge after overruling this contention held that the application being one under the Code, Art. 181 would apply and he purported to follow the decision in *Sambasiva Mudaliar* v. *Panchanada Pillai*[5], which is another decision relied on by Mr. Sesha Aiyar. That was a decision under S. 40 of the Revenue Recovery Act. The question there was what article would apply for an application by a purchaser at a revenue auction sale for delivery of possession. The learned Judges

1. (1934) 68 M.L.J. 200: I L R. 58 Mad. 760.
2. (1932) 65 M.L.J. 364: I.L.R. 56 Mad. 712.
3. (1927) 31 C.W.N. 1097.
4. (1936) 71 M.L.J. 759: I.L.R. (1937) Mad. 495
5. (1907) 17 M.L.J. 441; I.L.R. 31 Mad. 24.

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applied Art. 178 of Act XV of 1877, corresponding to Art. 181 of the present Limitation Act and the decision turned on the language of S. 40 of the Revenue Recovery Act which runs thus:

"Where, notwithstanding such publication, any lawful purchaser of land may be resisted and prevented from obtaining possession of his purchased land, any Court of competent jurisdiction, on application and production of certificate of sale provided for by S. 38 shall cause the proper process to be issued for the purpose of putting such purchaser in possession in the same manner as if the purchased lands had been decreed to the purchaser by a decision of the Court."

It is with reference to this language the following observations were made:

"The section as we read it places the purchaser in the position of a decree-holder for the purposes of putting the machinery of the Court in motion in order that the certificate of sale granted by the Revenue authority may be given effect to. It does not, by implication, make the law of limitation with reference to the execution of decrees or orders of Civil Courts applicable to proceedings under S. 40 of the Act."

But the language of r. 15, cl. 7 (*c*) given above is quite different. For the limited purpose of execution an award is treated as a decree of the Court. On this ground the decision in *Sambasiva Mudaliar* v. *Panchanada Pillai*[1] is distinguishable as it may be possible to contend that the use of the words "the proper process to be issued" and "in the same manner" connote only the bare machinery of the Court for putting the purchaser in possession. The other cases relied on by Cornish, J., in his judgment seem to me to have no bearing on the actual point for decision before me, and I think it unnecessary to deal with them.

Mr. Sesha Aiyar brought to my notice the decision in *Raghavendra* v. *Industrial Bank, Guledgud*[2], where Beaumont, C. J., doubted whether the award of the Registrar of Co-operative Societies under the Bombay Co-operative Societies Act of 1925 would ever become a decree of a Civil Court within the meaning of Art. 182 of the Limitation Act but left the question open. It may be pointed out that the wording of the rule which the learned Chief Justice was dealing with is different from the rule in the present case. The question is not, if I may say so, with respect whether the award becomes a decree of the Civil Court but whether the law of limitation governing the execution of the decree of a Civil Court is made applicable by statute by necessary

1. (1907) 17 M.L.J 441: I.L.R. 31 Mad. 24.
2. (1935) 38 Bom.L.R. 927.

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implication. Both the lower Courts took the view that the decision in *Co-operative Credit Society* v. *Chinnaswami Udayan*[1] would not apply in view of S. 57-B of the Act which runs thus:

"The Registrar or any person empowered by him in that behalf, shall be deemed, when exercising any powers under this Act for the recovery of any amount by the attachment and sale or by the sale without attachment of any property, or when passing any orders on any application made to him for such recovery or to take some step-in-aid of such recovery to be a Civil Court for the purposes of Art. 182 of the first schedule to the Indian Limitation Act, 1908."

In terms this section would not be applicable to an application for the enforcement of an award in a Civil Court as provided in r. 15, cl. 7 (*c*) but the object underlying the section in my opinion establishes beyond doubt that the legislature intended by necessary implication in enacting the said cl. (*c*) that Art. 182 of the Limitation Act would apply to applications made in pursuance thereof because the award has to be treated by a Court as a decree of that Court. The object in enacting S. 57-B is to have one uniform rule of limitation for the enforcement of decrees of Civil Courts and the decrees and awards and orders of a Registrar of Co-operative Societies and whether they are enforced by a Registrar or a Civil Court. It would be anomalous to hold that an award when enforced by a Registrar would be governed by Art. 182 but when enforced by a Civil Court is governed by Art. 181. In the result the appeal fails and is dismissed with costs. Leave to appeal granted.

K. S. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE LAKSHMANA RAO.

A. T. Kava .. *Petitioner* (Accused).*

Kava, *In re.*

District Municipalities Act (V of 1920), S. 174 (a)—Plying for hire—User of lorry within municipal limits—Licence not obtained—Hiring taking place outside municipal limits—Whether material.

Under S. 174 (*a*) of the Madras District Municipalities Act it is the plying of the motor lorry for hire within municipal limits without the necessary licence that constitutes the offence and it is immaterial that the act of hiring takes place outside such municipal limits.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Sub-Divisional First Class Magistrate

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1. (1936) 71 M.L.J. 759: I.L.R. (1937) Mad. 495.

* Crl. R. C. No. 679 of 1938. 9th December, 1938.
(Crl. R. P. No. 647 of 1938).

Kava, *In re.*

of Mangalore Division dated 25th July, 1938 and made in Crl. App. No. 27 of 1938 preferred against the judgment of the Court of the Stationary II Class Magistrate of Mangalore Taluk in C. C. No. 13 of 1938.

K. Y. Adiga and *K. P. Adiga* for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court made the following

ORDER.—The petitioner is the owner of motor lorry S. K. 1089 registered for private trade purposes and he has been convicted under S. 174 (*a*) of the District Municipalities Act read with S. 313 (1) for using the lorry on the public streets in the Municipality of Mangalore without requisite license for a motor lorry plying for hire.

The lorry of the petitioner was hired out for transporting coffee-husk from Chickmagalur to Mangalore on 2nd and 9th September, 1937, and it was used for that purpose on those occasions on the public streets in the Municipality of Mangalore. The lorry was obviously a lorry plying for hire though it was registered for private trade purposes, and the petitioner had no licence for a motor lorry plying for hire as required by S. 174 (*a*) of the District Municipalities Act. The section provides that no person shall use any motor lorry on any public street in any municipality except on a licence obtained from the executive authority, and it is immaterial where the act of hiring takes place. It is the user of the lorry that is relevant and the guilt of the petitioner under S. 174 (*a*) read with S. 313 (1) admits of no doubt. The conviction is therefore right but the fine of Rs. 75 in addition to the license fee is excessive. The fine is therefore reduced to Rs. 25 and otherwise this petition is dismissed. The excess of fine if levied will be refunded.

B. V. V. —— *Sentence reduced.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE KRISHNASWAMI AIYANGAR AND MR. JUSTICE SOMAYYA.

Kolachala Kutumba Sastri .. *Petitioner** (*Plaintiff*)

v.

Lakkaraju Bala Tripura Sundaramma and others .. *Respondents* (*Defendants*).

F.B. — Kutumba Sastri *v.* Lakkaraju Bala Tripura Sundaramma.

Court-Fees Act (VII of 1870), S. 7 (iv) (a) and (v)—Suit for cancellation of a deed and possession—Court-fee payable—Proper mode of valuation

A suit for the cancellation of a deed of conveyance and for possession of property should be valued under S. 7 (*iv*) (*a*) of the Court-Fees Act but the stamp fee must be based on the market value of the property at the time of the suit and not on the amount stated in the conveyance.

Bali Reddi v. *Abdul Satar*, (1935) 69 M.L.J. 458: I.L.R. 59 Mad. 240, approved.

Dantuluri Venkatanarasimha Raju v. *Dantuluri Chandrayya*, (1926) 53 M.L.J. 267 and *Venkatasiva Rao* v. *Satyanarayanamurthi*, (1932) 63 M.L.J. 764: I.L.R. 56 Mad. 212, overruled.

Petition under S. 115 of Act V of 1908 and S. 224 of the Government of India Act praying the High Court to revise the order of the Court of the District Munsif of Tenali dated 28th July, 1938, and made in Check-slip No. 931-3-1-N of 1938 in O.S. No. 4 4 of 1935.

V. Subramaniam for Petitioner.

Y. Suryanarayana for *K. Kotayya* for Respondents.

T. Krishna Rao for *The Government Pleader* (*B. Sitarama Rao*) on behalf of the Government.

The judgment of the Court was delivered by

Leach, C.J. *The Chief Justice.*—The question which the Court is called upon to consider in this case is whether in a suit for the cancellation of a deed of conveyance and for possession of the property the plaintiff should value his relief in accordance with the provisions of S. 7 (*iv*) (*a*) or those of S. 7 (*v*) of the Court-Fees Act. The plaintiff in this case filed a suit in the Court of the District Munsif of Tenali for a decree setting aside a conveyance which he had executed and for possession of the land covered by the deed, pleading that he had been induced to sign the instrument as the result of undue influence and fraud. On the basis that the plaint fell for the purpose of

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* C.R.P. No. 898 of 1938. 3rd March, 1939

F.B.

Kutumba Sastri v. Lakkaraju Bala Tripura Sundaramma.

Leach, C.J.

valuation within para. (*v*) of the section he affixed a stamp fee of the value of Rs. 34-13-0. The District Munsiff considered that para. (*iv*) (*a*) applied, which meant a court-fee of Rs. 119-15-0. Para. (*v*), as amended by the Madras Act of 1922, requires that in a suit for the possession of land the relief shall be valued at ten times the annual revenue payable to Government where such revenue is settled but not permanently, and that is the position here. By the amending Act para. (*iv*) (*a*) was inserted. This paragraph requires the court-fee in a suit for the cancellation of a conveyance to be calculated on the value of the property. The case has been placed before a Full Bench because there are conflicting decisions of this Court on the question whether on a suit of this nature the valuation should be according to the market value or whether the relief should be valued in accordance with one of the methods mentioned in para. (*v*).

In *Dantuluri Venkatanarasimha Raju* v. *Dantuluri Chandrayya*[1], Krishnan and Odgers, JJ., held that the value contemplated in S. 7 (*iv*) (*a*) was not the market value. It was said that where it was sought to set aside a decree affecting immovable property, the value of the relief should be calculated on the basis of a suit falling within para. (*v*). The reason given was that as the Act itself contained rules for the valuing of suits for possession of immovable property it was proper to take a method indicated by the Act in preference to any other method. A decision to the same effect was given in *Venkatasiva Rao* v. *Satyanarayanamurthi*[2], by a Division Bench consisting of Reilly and Anantakrishna Aiyar, JJ., but the judgments in that case do not add anything to what was said in the earlier case. These decisions were followed by King and Stodart, JJ., in a recent unreported case (S.A. No. 592 of 1932).

The same question was raised before Venkatasubba Rao, J., in *Bali Reddi* v. *Abdul Satar*[3]. The learned Judge considered that the proper method of calculating the value of the subject-matter of a suit falling under para. (*iv*) (*a*) was the market value. He felt that he was not bound by the previous Bench decisions because the case before him related to mortgages and

1. (1926) 53 M.L.J. 267.
2. (1932) 63 M.L.J. 764: I.L.R. 56 Mad. 212.
3. (1935) 69 M.L.J. 458: I.L.R. 59 Mad. 240.

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sale deeds whereas *Dantuluri Venkatanarasimha Raju* v. *Dantuluri Chandrayya*[1] and *Venkatasiva Rao* v. *Satyanarayanamurthi*[2] related to decrees affecting immovable property. The decision of Venkatasubba Rao, J., was followed by Wadsworth, J., in *Venkatakrishnayya* v. *Sheik Ali Sahib*[3].

We consider that the view taken by Venkatasubba Rao, J., in *Bali Reddi* v. *Abdul Sattar*[4] is preferable to that taken in *Dantuluri Venkatanarasimha Raju* v. *Dantuluri Chandrayya*[1]. Para. (*iv*) (*a*) deals with suits where it is necessary for the plaintiff to seek the cancellation of a decree or of a deed. Para. (*v*) relates merely to suits for possession. In a suit for possession it is not always necessary to set aside a decree or a document. Where a suit is merely for possession the Act says how the value of the subject-matter shall be arrived at. When adding para. (*iv*) (*a*) to S. 7 the Legislature did not say that in a suit falling within the new paragraph the valuation of the subject-matter should be arrived at in accordance with the method indicated in para. (*v*). It said that a suit within para. (*iv*) (*a*) should be valued according to the value of the property, and the value of the property, unless there is an indication to the contrary, must mean its market value. By the amending Act of 1922, para. (*iv*) (*c*) was also amended. Before the amendment this paragraph provided that in a suit to obtain a declaratory decree or order, where a consequential relief was prayed, the value should be according to the value of the relief sought by the plaintiff. The Amending Act inserted the proviso to the effect that in a suit coming under this paragraph in a case where the relief sought is with reference to immovable property the valuation shall not be less than half the value of the immovable property calculated in the manner provided for by para. (*v*). There the Legislature expressly provided that the method of calculation was to be in accordance with para. (*v*) but in adding para. (*iv*) (*a*) no such direction was given. The court-fee is to be calculated on the amount or the value of the property and to give the wording of para. (*iv* (*a*) its plain meaning the valuation must be the valuation based on the market value of the property at the date

1. (1926) 53 M.L.J. 267.
2. (1932) 63 M.L.J. 764: I.L.R. 56 Mad. 212.
3. (1938) 48 L.W. 277.
4. (1935) 69 M.L.J. 458: I.L.R. 59 Mad. 240.

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of the plaint. We consider that *Dantuluri Venkatanarasimha Raju* v. *Dantuluri Chandrayya*[1] and *Venkatasiva Rao* v. *Satyanarayanamurthi*[2] were wrongly decided and will therefore be overruled.

It follows that the District Munsif was right in requiring the suit to be valued under S. 7 (*iv*) (*a*) of the Court-Fees Act, but we do not agree that it necessarily follows that the stamp fee shall be based on the amount stated in the conveyance. It must be based on the value of the property at the time of the suit. It may very well be that on that date the market value was Rs. 900, the amount stated to be the consideration, but this question is not before us. All we need say is that the plaintiff will have to stamp his suit according to the market value of the property before the plaint is received.

In view of the earlier decisions we consider that there should be no order as to costs.

K.C. —— *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO.

Mamidi China Venkata Sivayya .. *Appellant** (*1st Counter-Petitioner*)

v.

Nekkanti Suryanarayana .. *Respondent* (*Petitioner*).

Venkata Sivayya v. Suryanarayana.

Provincial Insolvency Act (V of 1920), Ss. 28, 51 and 52—Application for adjudication and appointment of interim receiver—Purchase of property in Court-auction by decree-holder himself—If in contravention of S. 52—Sale proceeds—How to be applied.

By the combined operation of Ss. 28 and 51 it is clear that a sale of the property in execution until the date of the order of adjudication is not prohibited, in spite of the presentation and admission of the insolvency petitions but the creditor is not given the benefit of the remedy had by him. But S. 51 (3) protects the title of the auction-purchaser and if the purchase was in good faith, in spite of the fact that there has been an order of adjudication subsequent to the sale his title to the property will remain unaffected. The doctrine of "relation back" is subject to the exception in S. 51 (3).

Muthan Chettiar v. *Venkitusamì Naicken*, (1936) 71 M.L.J. 170: I.L.R. 59 Mad. 928 at 941, followed.

No difference ought to be made between a decree-holder purchaser and a stranger auction-purchaser. There is nothing in the provisions of the Insolvency Act to preclude a decree-holder from proceeding with the sale with the knowledge of the insolvency.

1. (1926) 53 M.L.J. 267.
2. (1932) 63 M.L.J. 764: I.L.R. 56 Mad. 212.

*C. M. S. A. No. 64 of 1936. 28th April, 1938.

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Sri Chand v. *Murari Lal*, (1912) I L R. 34 All. 628 and *Ralla Ram* v. *Ram Labhaya*, (1924) 6 Lah.L.J. 232, applied.

Cheedalla Polamma v. *Official Receiver, Nellore*, (1938) 1 M.L.J. 781, distinguished.

The only disability under which he lies is that he will not be entitled to set off the amount of the decree debt against the purchase price but must share rateably in the sale proceeds along with other creditors.

Appeal against the order of the Court of the Subordinate Judge of Narsapur dated the 20th March, 1936 and made in Mis. A. S. No. 36 of 1935 preferred against the order of the Court of the District Munsif of Narsapur dated the 30th November, 1935 and made in M.P. No. 1999 of 1935 in O. S. No. 290 of 1934.

M. Appa Rao for Appellant.

K. Bhimasankaran for Respondent.

The Court delivered the following

JUDGMENT.—The question in this appeal relates to the validity of a sale of immovable property in execution of the decree in O. S. No. 290 of 1934 on the file of the District Munsif's Court of Narsapur obtained by the appellant against one Nekkanti Suryanarayana and his two sons. The property was sold on 2nd October, 1935 and purchased by the appellant the decree-holder himself. An application was made by the said Nekkanti Suryanarayana the first judgment-debtor to set aside the sale alleging that there were material irregularities and fraud in the conduct of the sale in consequence whereof the property did not fetch a fair price. He also impeached the sale on the ground that before the date of the sale he had filed an application in the Sub-Court of Narsapur for his being declared an insolvent, that the said petition was admitted and an interim receiver appointed, that he applied to the Court (the District Munsif of Narsapur) to stop the sale but the Court declined to do so and the sale was therefore in contravention of S. 52 of the Provincial Insolvency Act. The learned District Munsif, on a consideration of the evidence adduced, came to the conclusion that there was no fraud or material irregularity in the conduct of the sale, that the price realised at the time of the sale was a reasonable price and in regard to the second objection he held that there was no substance in it. The learned Subordinate Judge in appeal concurred in the view of the learned District Munsif in regard to the finding as to the material irregularity and reasonable price but he was of the opinion that the sale was

in contravention of S. 52 of the Provincial Insolvency Act and therefore he allowed the appeal and set aside the sale. It is this order that is being attacked in this Civil Miscellaneous Second Appeal.

So far as the questions of material irregularity and fraud are concerned, there are concurrent findings of fact and they cannot be challenged in second appeal.

The question therefore for consideration is whether the sale is invalid. It is contended that once an interim receiver has been appointed and the fact of such appointment is brought to the notice of the executing Court, it is bound to stay the sale and a sale held after such notice is invalid and the purchase at any such sale with notice of the insolvency could not be held to be a purchase in good faith. To test the soundness of this contention it will be necessary to examine the relevant provisions of the Provincial Insolvency Act bearing on the matter. They are Ss. 28, 51 and 52. In construing these provisions two principles have to be kept in view: (1) It is the policy of the law of insolvency that when a debtor commits an act of insolvency, there must be an even distribution of his property among his creditors and no creditor of his should be entitled to receive more than a rateable proportion of the amount realised from the property of the insolvent and available for distribution equally with other creditors. (2) It is the policy of the law not to frustrate the effort of a diligent execution creditor and deprive him of the fruits of his execution. I think the provisions of the Insolvency Act have been enacted to secure the object underlying these principles. Under S. 28 (2) of the Provincial Insolvency Act, on the making of an order of adjudication, the whole of the property of the insolvent vests in the Court or in an Official Receiver appointed by the Court but until then the property of the insolvent is not divested from him and every creditor is free to have recourse to all available remedies against the debtor for realisation of his debt. The section clearly provides that the disability of the creditor to have any remedy against the property of the insolvent is only after the order of adjudication. This is clear from the expression "thereafter" in the section. Even then it is not an absolute disability imposed by the Act but only subject to the provisions of the Act as indicated by the words "except as provided by this Act." From the provisions of S. 28 (2) it is

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clear that a decree-holder can attach and bring the property to sale and have the property sold till the date of the order of adjudication. The question therefore is if, before the date of the order of adjudication, the property is sold and the sale proceeds are deposited into Court, what are the rights of a creditor, the purchaser and the receiver in regard to the property and the sale proceeds?

I shall now turn to Ss. 51 and 52 of the Act. S. 51 says that where execution of a decree has issued against the property of a debtor, a creditor shall not be entitled to the benefit of the execution against the receiver except in respect of assets realised in the course of the execution by sale or otherwise before the date of the admission of the petition. By virtue of this provision the creditor can only claim the sale proceeds of a sale in execution of the decree obtained by him only if they have been realised before the date of the admission of the petition. But for this provision it will be open to the Official Receiver to contend that the creditor is not entitled to the sale proceeds because by virtue of the provisions of S. 28 (7) of the Act, the property must be deemed to have vested in him from the date of the presentation of the petition and hence by virtue of the statutory title thus conferred on him he will be the person entitled to the sale proceeds of the property which in law belong to him. By the combined operations of Ss. 28 and 51 it is clear that a sale of the property until the date of the order of adjudication is not prohibited in spite of the presentation of and the admission of the insolvency petition, but the creditor is not given the benefit of the remedy had by him. But the law protects the title of the auction-purchaser to the property sold in auction because S. 51 (3) provides that:

> " A person who in good faith purchases the property of a debtor under a sale in execution shall in all cases acquire a good title to it against the receiver."

If therefore a purchaser can say that the purchase was made in good faith, in spite of the fact that there has been an order of adjudication subsequent to the sale, his title to the property will remain unaffected. Therefore the doctrine of relation back of the title of the Official Receiver is subject to the exception enacted in S. 51 (3). (*Vide* Cornish, J.'s observations in ***Muthan Chettiar*** v. ***Venkituswami Naicken***[1].) It is

1. (1936) 71 M.L.J. 170: I.L.R. 59 Mad. 928 at 941.

unnecessary for me now to consider for the purpose of this case whether a purchaser in good faith can acquire good title to the property sold even after the order of adjudication, because in this case the property has been sold before the date of the order of adjudication.

The question now arises as to the scope and operation of S. 52 of the Act. I may here mention a few facts and dates. The petition for insolvency was made after the order for sale was passed and the date of sale was fixed for 30th September, 1935, but the petition was admitted and an interim receiver appointed on 30th September, 1935, under S. 20 of the Act. The interim receiver did not make any application as required by S. 52 of the Act to deliver to him the property which was being brought to sale and the only application that was made was by the insolvent to stay the sale. The Court refused to stay the sale and the sale was held and at such a sale the property was purchased by the decree-holder. The question on these facts is, is the purchase by the decree-holder invalid? I have already stated that neither S. 28 nor S. 51 prohibits the sale until the date of the order of adjudication nor does S. 52, because what that section says is before the property is brought to sale if notice is given to the executing Court that an insolvency petition by or against the debtor has been admitted, the Court shall on application direct the property to be delivered to the receiver. The duty which is enjoined on the executing Court is to deliver the property to the receiver if an application is made in that behalf, and I shall assume for the purpose of this case that the 'receiver' in S. 52 includes an interim receiver. But if no application is made, what should the executing Court do? It is bound to proceed with the sale of the property. There is nothing in the section to indicate that the executing Court is prohibited from doing what it is obliged to do and its power to sell the property remains 'unaltered and unaffected' (*vide* the observations of Lord Esher in *Trustee of Woolford's Estate* v. *Levy*[1], on the analogous Ss. 45 and 46 of the Bankruptcy Act of 1883). Therefore the sale by the Court is *prima facie* valid.

The questions that now fall to be decided are, does the auction-purchaser get a good title to the property and who is

1. (1892) 1 Q.B. 772 at 780.

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entitled to the sale proceeds? These questions turn upon the other provisions of the Insolvency Act and they have been already adverted to, namely, Ss. 28 and 51. In a recent decision reported in ***Muthan Chettiar*** v. ***Venkituswami Naicken***[1], Venkatasubba Rao and Cornish, JJ., upheld a sale in favour of a purchaser, even though the sale was held after an application was made under S. 52 by the Official Receiver and refused, on the ground that the purchaser acquired valid title under S. 51 (3) of the Act. But the present case is a stronger one in that no application has been made by either the Official Receiver or by the judgment-debtor to direct delivery of the property and I am of the opinion that the application for stay of the sale is not in conformity with the provisions of S. 52.

Therefore the question is, is the appellant a purchaser in good faith within the meaning of S. 51 (3) of the Act? So far as the sale is concerned, it was for a proper price and there was no irregularity or fraud in the conduct of the sale and no bad faith was attributed to the decree-holder. All that is asserted is that the fact of his purchasing the property with notice of the insolvency is enough to negative the existence of good faith. I am not inclined to agree with this contention. In ***Muthan Chettiar*** v. ***Venkituswami Naicken***[1], the learned Judges were inclined to the view that the mere fact that the purchaser had notice of the insolvency cannot connote want of good faith on the part of the purchaser. They further held in that case that a purchase made on the faith of a Court's order would negative all inferences of bad faith. No doubt, in that case the auction-purchaser was a stranger but I do not think, having regard to the plain language of the section, any difference ought to be made between a decree-holder purchaser and a stranger auction-purchaser. S. 51 (3) says a "person". If, in pursuance of a valid order of Court, the decree-holder purchases the property with the leave of the Court entitling him to bid, I do not see any reason why the fact of his being a decree-holder should lay him under a disability to purchase the property. The only question is one of good faith. If he has purchased the property in good faith, there is no reason why the purchase by him should not be upheld. The fact that he had notice of insolvency would not in my opinion indicate any absence of good faith on his

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1. (1936) 71 M.L.J. 170: I.L.R. 59 Mad. 928.

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part. Good faith implies honesty and there is nothing to indicate here that the purchase was dishonest or colourable or fraudulent. There is nothing in the provisions of the Insolvency Act, to preclude a decree-holder from proceeding with the sale with the knowledge of the insolvency (vide *Sri Chand* v. *Murari Lal*[1] and *Ralla Ram* v. *Ram Labhaya*[2]). The only disability under which he lies is that he will not be entitled to the benefit of the execution, that is, he cannot set off the amount of the decree debt against the purchase price but he is bound to pay the amount of the purchase money into Court just like any other stranger purchaser and share in the sale proceeds rateably along with other creditors. This position has not been disputed by Mr. Appa Row and I think rightly. I do not see why the mere fact of knowledge of insolvency should preclude the decree-holder from proceeding with the sale of the property. It may be that no order of adjudication would be made at all, and if he should only stay his hand in the meanwhile, some other creditor might also attach the property and completely deprive him of the advantage of his having taken proceedings earlier. It may be by staying his hand and postponing the sale, the property might not fetch a fair price at a subsequent sale and it will be more advantageous to have an immediate sale and get a fair price and even though he may be deprived of the fruits of the execution, he will be entitled to get a fair dividend by reason of the property fetching a good price. Neither in principle nor in reason does it seem to me that notice of insolvency should operate as a bar to a decree-holder proceeding with the sale of the property. A recent decision of Pandrang Row, J., in *Cheedalla Polamma* v. *Official Receiver, Nellore*[3], has been cited before me. The facts in that case are different because the learned Judge found that the circumstances of that case warranted a finding of absence of good faith. I do not find the learned Judge laying down that mere knowledge of the insolvency imports bad faith. On the other hand he observes thus:—

> "It may be that where the fact of the pending insolvency is brought to the notice of the Court and the Court nevertheless proceeds with the sale as happened in *Muthan Chettiar* v. *Venkituswami Naicken*[4], the mere knowledge of the insolvency possessed by the purchaser may not be sufficient to show that the purchaser acted in bad faith or did not act in good faith. But that is not the case here."

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1. (1912) I.L.R. 34 All. 628. 2. (1924) 6 Lah.L.J. 232.
3. (1938) 1 M.L.J. 781. 4. (1936) 71 M.L.J. 170: I.L.R. 59 Mad. 928

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I do not think the learned Judge intended to law down any principle in conflict with the view which I have now expressed. Further, in this case it is only the father that has become an insolvent and his share alone would vest in the Official Receiver and the shares of his sons would not vest in him. *Prima facie*, the decree-holder would be entitled to bring to sale the sons' share in the property. Under such circumstances, it would be more advantageous to bring the entire property to sale and that is probably the reason why the interim receiver did not choose to interfere thinking that he might claim the proceeds of the sale without interfering with the sale.

I am therefore of the opinion that the sale held on 2nd October, 1935, is perfectly valid and that the appellant has acquired good title to the property. I accordingly set aside the order of the learned Subordinate Judge and restore that of the District Munsif with costs throughout.

Leave to appeal refused.

K.S. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE SOMAYYA.

T. S. Gopalaswami Odayar and another .. *Petitioners**

v.

T. S. Swaminatha Odayar and others .. *Respondents.*

Gopala-swami Odayar v. Swaminatha Odayar.

Execution—Sale by receiver pursuant to order of Court—Absence of adequate notice—Effect—"Not less than thirty days' notice" under Civil Procedure Code—Need for giving.

In cases where immovable property is to be sold by a receiver in pursuance to an order of Court, unless there are special circumstances or he is otherwise directed by the Court, the receiver should follow the rule laid down in the Civil Procedure Code, and give not less than thirty days' notice and a sale held without such adequate notice is liable to be set aside

Petition praying that in the circumstances stated in the affidavits filed therewith the High Court will be pleased to issue an order setting aside the sale held by the receiver the fifth respondent herein on 28th January, 1939, by refusing the confirmation thereof, in Appeal No. 60 of 1933 preferred to the High Court against the order of the Court of the Subordinate

* C. M. P. No. 551 of 1939. 22nd February, 1939.

Judge of Kumbakonam dated 26th September, 1932 and made in I. A. No. 695 of 1930 in O. S. No. 22 of 1924.

Gopalaswami Odayar *v.* Swaminatha Odayar.

K. Rajah Aiyar and *N. A. Krishna Aiyar* for Petitioners.

T. R. Venkatarama Sastri, G. Jagadisa Aiyar, S. Ramanujam, T. R. Srinivasa Aiyangar, M. S. Venkatarama Aiyar, A. V. Viswanatha Sastri, K. Swaminatha Aiyar, K. R. Rangaswami Aiyangar and *K. Krishnaswami Aiyangar* for Respondents.

The Court made the following

ORDER.—The question before us is whether a sale which has taken place by the direction of this Court should be confirmed or whether a fresh auction should be ordered. The suit out of which this matter arises was filed for partition of the properties of a joint Hindu family. The final decree was passed on the 5th May, 1938, and the first defendant, who is objecting to the sale being confirmed, received as his share in the family estate immovable properties in the Tanjore District, but he was directed to pay to the fourth defendant in the suit Rs. 7,662-6-0 and to the sixth defendant Rs. 12,841-7-8, both sums to carry interest. In order to discharge the first defendant's liability to the fourth and sixth defendants a receiver was appointed to sell a portion of the lands allotted to him. The receiver gave notice that a sale would take place on the 28th January of this year. The sale took place on that date and the properties were sold to the sixth respondent for a sum of Rs. 31,250. The sale was expressly stated to be subject to the confirmation of the Court and the first defendant says that it should not be confirmed for a number of reasons, one of them being that adequate notice of the sale was not given. We consider that this contention is well founded and it is not necessary for us to inquire into the truth of the other allegations.

An advertisement was published in "*The Hindu*" and "*The Swadesamitran*" on the 19th January, 1939, that is, nine days before the sale. The advertisement appeared only in one issue of the respective newspapers. The receiver sent copies of the sale announcement to a considerable number of public officials in the Tanjore District with a view to the posting of the announcement on notice boards and also circularised about a hundred persons whom he thought might be possible bidders. It is quite clear that these notices would not reach the addressees until the 20th or possibly later. It may safely be taken that

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generally notice was not received more than a week before the date fixed for the sale. We consider that in cases where immovable property is to be sold by order of the Court far more than a week's notice should be given For a sale in execution of a Court decree the Civil Procedure Code requires that not less than thirty days' notice shall be given. I may mention that the receiver fixed the upset price at Rs. 53,000, but he did not insist on any upset price at the sale and he knocked down the property to the sixth respondent for Rs. 31,250. Property values may have fallen, but where property which was valued at Rs. 1,26,000 in 1932, as in this case, is sold some six years later for Rs. 31,250, it would appear to be an inadequate price. But be this as it may, what the Court is really concerned with is the fact that the sale was not properly advertised and sufficient notice was not given. In these circumstances we refuse to confirm the sale.

We are of the opinion that receivers should, unless there are special circumstances or otherwise directed by the Court, follow the rule laid down by the Civil Procedure Code, and give not less than thirty days' notice. Of course the parties may agree to a lesser period.

The purchase price paid by the purchaser will be refunded to him by the receiver. The costs of the sale will be paid by the first defendant within a fortnight's time after the receiver has given intimation of the exact amount.

The Court as has been informed that a re-sale may not be necessary as the first defendant has come to an arrangement with the fourth defendant and the tenth defendant, who now represents the sixth defendant. If a re-sale is not necessary as the result of an arrangement between the parties the receiver will nevertheless be entitled to his commission. By consent it is agreed that in the event of there being no re-sale the first defendant shall pay into Court as the receiver's commission a sum of Rs. 900. Liberty will be given to the receiver to apply to the Court in the event of this order not being complied with.

B. V. V. —— *Sale set aside.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Patna.]

PRESENT:—LORD WRIGHT, LORD ROMER, LORD PORTER, SIR SHADI LAL AND SIR GEORGE RANKIN.

S. N. Bannerjee and another .. *Appellants**

v.

Kuchwar Lime and Stone Company, Limited (in liquidation) and others.. *Respondents.*

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Bannerjee
v.
Kuchwar
Lime and
Stone
Co., Ltd.

Contempt of Court—Breach of injunction and abetment—Committal—If proceedings "criminal"—Leave to appeal to Privy Council—Propriety of granting in cases where penalty imposed.

A committal for a finding of contempt for breach of an injunction is not criminal in its nature, and is properly treated under the Civil Procedure Code.

Certain persons having been held by the High Court to be guilty of contempt of Court in connection with disobedience to an injunction granted by the High Court, and a penalty in costs having been imposed,

Held, that leave to appeal was rightly given notwithstanding the imposition of a penalty for the contempt.

Consolidated appeals from a decision of the High Court, Patna, dated 9th October, 1936 (Terrell, C. J., and Noor and Varma, JJ.).

J. Millard Tucker, K.C. and *W. Wallach* on behalf of the Secretary of State.

J. M. Pringle for Appellant Banerjee.

L. P. E. Pugh, K. C. and *T. F. R. McDonnell* for Respondents.

31st October, 1938. Their Lordships' judgment was delivered by

Lord Porter.

LORD PORTER.—These are consolidated appeals from an order of the High Court of Judicature at Patna, dated the 9th October, 1936, made on the petition of the Kuchwar Lime and Stone Company (in liquidation), whereby it was ordered that (1) the Secretary of State for India in Council, (2) S. N. Ghose, and (3) S. N. Bannerjee had been guilty of contempt, and that the Secretary of State should forthwith pay to the petitioners one half of their costs, and that the other respondents should also pay to the petitioners one half of their costs and should be jointly and severally liable therefor. Of these persons S.N. Ghose

* P. C. Appeal No. 82 of 1937
Patna Appeal No. 39 of 1936. 31st October, 1938.

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is the managing director of a company called the Kalyanpur Lime Works, Ltd. and S. N. Bannerjee then manager of that company.

The reason for the petition is to be found in the previous acts and relationship of the parties.

On the 1st April, 1928, the Secretary of State granted to the petitioners two leases, one of the mineral rights in Lower Murli Hill and the other of the surface and mineral rights in Upper Murli Hill, for a period of 20 years. The leases contained stipulations against assignments or the transfer of any right or interest thereunder without the previous assent of the Board of Revenue of Bihar and Orissa, and provided that a breach of those stipulations should entail a right of forfeiture by the Government. On the 23rd September, 1928, the respondents purchased the surface rights in Lower Murli Hill from the local zemindar.

In January, 1933, the respondents went into voluntary liquidation, and on the 30th September of that year entered into a written agreement with one S. G. Bose for the sale to him of their right under the two leases.

On the 6th October the respondents, who had acquired the surface rights in Lower Murli Hill, sold those rights to Bose, and on the 9th October, 1933, applied to the Collector of Shahabad for permission to assign the lease to him. On the same day Bose started quarrying operations. On the 6th December, 1933, the sub-divisional officer of Sasaram, acting under the instructions of his superiors, refused permission to assign and directed Bose to stop work.

On the 20th April, 1934, the Commissioner of the Division informed the respondents' solicitors that the Government had by order dated the 27th March, 1934, forfeited the leases, and the Government formally confirmed the forfeiture on the 18th July, 1934.

Meanwhile, S. N. Ghose, as managing director of the Kalyanpur Lime Works, Ltd., having heard that the leases were being terminated, wrote to the Collector of Shahabad offering, on behalf of his company, to take leases of the properties. By letter dated 31st March, 1934, from the Secretary to the Board of Revenue to the Commissioner, a copy of which was forwarded to S. N. Bannerjee as manager of that company, the offer was

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accepted. On receiving the copy of this letter, the Kalyanpur Company took possession of the quarries in April, 1934, and this action was approved by the Collector in a letter dated the 13th May, 1934, in which he stated that "having been granted a lease of Lime Stone concession in the Upper and Lower Murli areas you are lawfully entitled to start work on them at once". On the 21st April, 1934, S. N. Bannerjee informed the respondents that the Board of Revenue had sanctioned the leases to the Kalyanpur Company.

Certain disputes arose between that company and Bose as to rights of ingress to and egress from the quarries, but the company continued to work the quarries until the 20th May, 1935, when they temporarily suspended operations.

The events which led up to this suspension were as follows:—

On the 24th September, 1934, the respondents brought a suit in the Court of the Subordinate Judge of Arrah against the Secretary of State for a declaration that their leases had not been validly forfeited and for an injunction to restrain the Secretary, his servants and agents, from granting leases to the Kalyanpur Company or to others and from authorising such person or persons to carry on operations in the Murli Hills and from otherwise interfering with any of the rights of the respondents in respect of those hills. The Secretary of State in his defence contended that he had rightly terminated the leases, ejected the respondents and authorised the Kalyanpur Company to enter and work the quarries. The Subordinate Judge dismissed the suit on the 7th March, 1935. The respondents thereupon appealed to the High Court, and, on the 25th April, 1935, *ex parte* obtained an interim injunction against the Secretary of State in the terms set out above. S. N. Bannerjee received a copy of this injunction on the 20th May, 1935, and work was stopped the next day.

On the 7th February, 1936, the High Court allowed the appeal, held that the two leases had not been validly forfeited, and ordered that there should be an injunction restraining the defendant and his servants from interfering with the respondents' leases on the basis of the forfeiture claimed by him in the Government notification of the 18th July, 1933. From that judgment the Secretary of State appealed to this Board, and

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judgment dismissing his appeal was given on the 19th November, 1937.

There is no doubt but that all the appellants were, from the date of its pronouncement, aware of the granting of the injunction and its terms. The Kalyanpur Company asserted that they stopped work, not because of the injunction, which they contended was not binding upon them, but because the Government had given them an executive order to do so, but the Government never accepted this position. Acting, however, on the contention that they were not bound by the injunction, the Kalyanpur Company resumed quarrying operations on the 2nd March, 1936, and on the next day informed the Chief Inspector of Mines and the Collector that they had done so. The Collector replied on the 16th March, 1936, that they were taking this course at their own risk. On the 9th March, the respondents' solicitors, having been informed that the Kalyanpur Company had again begun work at the quarries, wrote to the Collector pointing out that judgment had been given in their clients' favour by the High Court, and requesting that immediate instructions be given prohibiting the Kalyanpur Company from continuing to carry out any operations on the mines and for the restoration of possession to Mr. Bose, the respondents' agent.

On the 18th March, by letter sent to the Collector to the Commissioner of the Patna Division and to the Chief Secretary to the Government of Bihar and Orissa, the solicitors repeated their protest, stated that the failure to take any steps to prevent the trespass appeared to them to constitute a contempt of Court, and added that they would move the Court unless steps were taken by the Government to prevent the Kalyanpur Company from further trespass. After receiving a reply stating that the matter was being considered, they wrote again on the 28th March asking what steps had been taken to stop the working in the mines by the Kalyanpur Company. This letter crossed one from the Collector of the same date, which may be set out in full since it forms the basis of the complaint against the Secretary of State in the present proceedings.

"GENTLEMEN,

"With reference to your letter number M/N-7463, dated the 18th March, 1936, I have the honour to say that on the authority of letter number 21-27-4, dated the 31st March, 1934, issued by the Board of Revenue of Bihar and Orissa possession of the quarries at the Murli Hill was delivered to Messrs. The Kalyan Lime Works, Limited, on the 15th April, 1934. That

company took possession of the quarry on that date and they have been working in it since the 1⁵th May, 1934. Messrs The Kalyanpur Lime Works, Limited, were not parties to the suit which was brought against Government by the liquidators of the Kuchwar Lime and Stone Company, Limited, and the decree passed by the High Court does not give Government authority to eject their present lessees. You may take such legal action against Messrs The Kalyanpur Lime Works, Limited, as you are advised.

I have the honour to be,
Sir,
Your most obedient servant,
R. A. E. Williams,
Collector of Shahabad, 28-3-36."

On receipt of this letter, the respondents petitioned the High Court at Patna to commit all the appellants for contempt in disobeying the injunction of that Court. By order of the 19th November, 1936, the High Court allowed the application, declared the three appellants guilty of contempt, and made the order as to costs hereinbefore set out.

The substantial ground on which the High Court came to its conclusion was (*a*) that by their letter of the 28th March, 1936, the Government had made up their minds to depart from the correct attitude of the Collector and had decided to come out into the open and support the cause of the Kalyanpur Company; (*b*) that the Kalyanpur Company were treated by the Government as lessees and the Government had said that they would support their supposed lessees in that attitude; and (*c*) that by some means or other the Kalyanpur Company had persuaded the higher authorities in the Government hierarchy to support their possession. The High Court accordingly held the Government in contempt by direct breach of the injunction by allowing Bannerjee and Ghose to work the quarries, and by encouraging them by their support.

As to the other two appellants, admittedly they were the executive authority of the Kalyanpur Company and as such responsible for its actions. The High Court, therefore, on the authority of *Seaward* v. *Paterson*[1] held that, as they were aware of the injunction, their presence upon the quarries with the permission of the Government was a setting at nought of the order of the Court and therefore a contempt. S. N. Ghose and S. N. Bannerjee obtained a certificate that the case was fit for appeal under S. 109 (*c*) of Act No. V of 1908 on the 20th

1. (1897) 1 Ch. 545.

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April, 1937, and on the same date the Secretary of State obtained a like certificate under the same section. The appeals were afterwards admitted under S. 45 of the Code of Civil Procedure. Later the appeals were consolidated and were heard by the Board as consolidated appeals.

A preliminary objection to their hearing was made by the respondents on the ground that the contempt in both cases or at any rate in the case of Ghose and Bannerjee was of the nature of a criminal matter, that the leave granted was granted under the Civil Procedure Code, and that inasmuch as it was in the wrong form, this Board should hold on the authority of *Radha Krishn Das* v. *Rai Krishn Chand*[1], that leave had not properly been given.

The objection is purely technical and so far as the Secretary of State is concerned their Lordships think it now sufficiently established that a committal for a finding of contempt for breach of an injunction is not criminal in its nature and is properly dealt with under the Civil Procedure Code. See *Scott* v. *Scott*[2].

The question whether a contempt committed, not by any person inhibited by injunction for breach of that injunction, but by a person said to have aided and abetted a person so inhibited in breaking the injunction is of such a criminal nature as to prevent an appeal, has given rise to much controversy—controversy which in the present case this Board does not think it necessary to resolve.

The respondents themselves when petitioning the Court asked the Court to issue notice upon the opposite parties to show cause why they should not be committed for contempt for disobedience of the injunction. Strictly speaking this was a wrong remedy to ask against Ghose and Bannerjee. The injunction was not binding on them and they had never disobeyed it. The petition should have asked that they be committed for aiding and abetting the Secretary of State in his disobedience. Indeed, on the authority of *Wellesley* v. *Mornington*[3], the High Court might well have dismissed the petition against those two appellants and left the petitioners to apply

1. (1901) L.R. 28 I.A. 182: I.L.R. 23 All. 415 (P.C.).
2. (1913) A.C. 417 at 456.
3. (1848) 11 Beav. 180 and 181: 50 E.R. 785.

again in proper form. Though the High Court did not do so but treated the petition as if application had been made to commit those appellants for contempt in aiding and abetting the Secretary of State, yet their Lordships do not think that the respondents have any cause of complaint if the Court, in admitting the appeal, treated the case (as the respondents themselves had done) as being a petition for breach of the injunction, and gave a certificate as in a civil matter.

It was further argued that in any case leave to appeal should not have been granted and an appeal should not be admitted in cases where penalties have been imposed for contempt. That very question has, however, lately been before their Lordships in *Ambard* v. *A. G. for Trinidad*[1], where Lord Atkin gave it as the clear opinion of the Court that it is competent to His Majesty in Council to give leave to appeal and to entertain appeals against orders of the Courts overseas imposing penalties for contempt of Court. In such cases, however, the discretionary power of the Board will no doubt be exercised with great care. Such interferences when they amount to contempt are quasi-criminal acts and orders punishing them should generally speaking be treated as orders in criminal cases. The learned and noble Lord was then speaking of contempt in criticizing the action of a Court and not of contempt in disobeying an injunction or in aiding and abetting such disobedience, but, whether or no the rules laid down by Lord Atkin apply to this case, their Lordships are of opinion on the material before them that leave was rightly granted.

As to the substantive question of the appeal, their Lordships do not find themselves in agreement with the view of the High Court. So far as the Secretary of State for India is concerned, the ground on which liability was imposed was that he and his subordinates had in March, 1936, supported and endorsed the action of the Kalyanpur Company in either continuing in or retaking possession of the quarries at Upper and Lower Murli. In coming to this conclusion the High Court made it plain that they were influenced and influenced solely by the Collector's letter of the 28th March, 1936. In argument before the Board the Secretary of State reserved the question whether the proceedings were properly framed against him, first

1. (1936) A.C. 322 at 329.

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because he was sued in his public capacity as Secretary of State in Council and therefore as a body corporate against whom sequestration might be invoked but no order for contempt could be made, and secondly because in any case he could not be made responsible in contempt for the action of his officials in India.

He was, however, prepared to assume for the purpose of the argument that in a proper case proceedings for contempt could be taken against him.

Making this assumption, however, he contended that no evidence of disobedience to the injunction or of contempt for the order of the Court had been shown.

With this contention their Lordships agree. It is true that the reversion of the surface and mining rights in Upper Murli and of the mining rights in Lower Murli belonged to the Government. But the surface of Lower Murli belonged to Mr. Bose, and the immediate right to possession of the surface of Upper Murli and of the minerals in both belonged to the respondents. It was for the respondents, who either had the immediate right to possession or were in possession under the order of the Court, and not for the Government, who were not in possession to eject the Kalyanpur Company, if ejection was to be effected. Indeed the respondents might at any time have made that company defendants in the original action. The Government were under no duty to act; their duty was to leave those who claimed to be entitled to possession of the soil to take the appropriate measures. But it is said that the Government did act in a manner hostile to the respondents in that they incited the Kalyanpur Company to take or retain possession in defiance of the order of the Court. Their Lordships can see no evidence of this either in the letters or in the circumstances of the case. In the first place, it is to be noticed that the letter of the 28th March is not written to the Kalyanpur Company, but to the solicitors to the respondents, and there is nothing to show that it ever reached the eyes of Ghose or Bannerjee. But, even if it had done so, in their Lordships' view there is nothing in the letter itself to indicate that the Government were supporting the Kalyanpur Company. The letter is a statement of fact necessitated by the communication to which it was a reply, and sets out the considerations which weighed with the Government in deciding to take no action. Their Lordships see no ground

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for suspecting the motives of the Government officials, much less evidence of a breach of the injunction.

The respondents, however, contended that, even if the Secretary of State was not himself guilty of direct disobedience to the injunction which had been granted, yet the other two appellants were guilty of contempt upon the principles set out in *Avery* v. *Andrews*[1] and *Seaward* v. *Paterson*[2]. In terms, however, those cases limit the offence of contempt by a person not a party to the injunction to cases where they aid and abet the party enjoined in its breach. Where, as here, that party has not broken the injunction it is impossible to hold that anyone has aided or abetted them in breaking it. The respondents sought to avoid this difficulty by maintaining that the doing by anyone of an act which was forbidden by the injunction was itself an offence. Their Lordships can find no authority for so wide a proposition. It is certainly not enunciated or indeed hinted at in the cases referred to nor do they think it is sound in principle. The actual wording of the injunction in the present case is "to restrain the defendant and his servants from interfering with the plaintiffs' lease." Ghose and Bannerjee are not the servants of the Secretary of State and therefore did not do anything forbidden by the injunction.

The utmost which the respondents could say was that the Kalyanpur Company, having derived their supposed interest from the Secretary of State, who had been forbidden to interfere with the respondents' lease, were acting against the spirit if not the letter of the injunction in taking or continuing in possession of the quarries, and were therefore guilty of contempt in interfering with the respondents' lease. The fact, however, that Ghose and Bannerjee claimed on behalf of their company to derive title, rightly or wrongly (and their Lordships will assume wrongly), through the Secretary of State, cannot in their view make them liable for an act not forbidden to them though forbidden to him. The question of the Kalyanpur Company's right to possession, if it is to be tested, must be fought out on an issue properly framed against that company. In their Lordships' view Ghose and Bannerjee could only be held liable for contempt if they had aided and abetted the Secretary of State in breaking the injunction, and as has been

1. (1882) 51 L.J. Ch. 414.

2. (1897) 1 Ch, 545.

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explained above that liability must fail if the petition against the Secretary of State fails.

Though the appeals were consolidated the two questions were in their Lordships' view distinct, and it was proper that the first two appellants should be separately represented.

Their Lordships will therefore humbly advise His Majesty that both appeals should be allowed, and that the order declaring the appellants guilty of contempt and ordering them to pay costs should be discharged, and the respondents ordered to pay the costs of both sets of appellants before the Board and in the Courts below.

Solicitors for Appellants: *The Solicitor, India Office* and *Hy. S. L. Polak & Co.*

Solicitors for Respondents: *Sanderson Lee & Co.*

R.C.C. —— *Appeals allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE GENTLE.

Ayanampudi Venkayya .. *Petitioner* (3rd Respondent)*

v.

Lanka Rattayya .. *Respondent (Petitioner—Transferee — Decree-holder).*

Venkayya v. Rattayya.

Civil Procedure Code (V of 1908), O. 26, r. 4 and S. 141—Commission to examine witnesses—O. 26, r. 4—Applicability to execution proceedings.

The provisions of O. 26, r. 4, Civil Procedure Code, are not applicable to execution proceedings and have not been made so by reason of the provisions of S. 141. There is no jurisdiction to issue a commission warrant to obtain the evidence of witnesses in execution proceedings.

Case-law reviewed.

Petition under S. 115 of Act V of 1908, praying the High Court to revise the order of the Court of the Subordinate Judge of Bezwada dated 26th September, 1938 and made in C.M.P. No. 392 of 1938 in O.S. No. 15 of 1931.

K. Krishnaswami Aiyangar and *N. Suryanarayana* for Petitioner.

P. Sivaramakrishniah for Respondent.

The Court delivered the following

JUDGMENT.—The decree in O. S. No. 15 of 1931 on the file of the Subordinate Judge's Court at Bezwada having been assigned to the respondent, he applied to the learned Subordinate Judge under O. 21, r. 16 to be brought on record as the trans-

* C.R.P. No. 1640 of 1938. 10th February, 1939.

feree decree-holder. Objection having been made by the petitioner, the respondent desired to call evidence in support of his application. In C.M.P. No. 392 of 1938, he applied for the issue of a commission warrant to the Small Causes Court, Calcutta, for the examination of two witnesses on interrogatories. This application was made under the provisions of O. 26, r. 4, Civil Procedure Code. The learned Subordinate Judge allowed the application.

The petitioner contends that this order was passed without jurisdiction as the provisions of the above order apply only to suits and do not apply to proceedings in execution. It is not disputed that the application under O. 21, r. 16 is a proceeding in execution. The relevant provisions of O. 26, r. 4 are as follows:—

"Any Court may in any suit issue a commission for the examination of (*a*) any person resident beyond the local limits of its jurisdiction."

The two witnesses whose evidence was required lived over 200 miles from Bezwada and beyond the local limits of the Subordinate Judge's Court, and in that respect the application was justified. The respondent contends that by S. 141, Civil Procedure Code, the provisions of the above rule are made applicable to proceedings in execution. S. 141 reads as follows:

"The procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction."

In *Thakur Parshad* v. *Sheikh Fakir-ul-lah*[1], their Lordships of the Privy Council, at page 11, said that

"The whole of Chapter XIX of the Code consisting of 121 sections, is devoted to the procedure in execution, and it would be surprising if the framers of the Code had intended to apply another procedure, mostly unsuitable, by saying in general terms that the procedure for suit should be followed as far as applicable. Their Lordships think that the proceedings spoken of in S. 647 include original matters in the nature of suits such as proceedings in probates, guardianships, and so forth, and do not include executions."

This was decided under the provisions of the old Code, in which Chapter XIX corresponds to O. 21, and S. 647 to the present S. 141, the wording of S. 647, is, although slightly different, to the same effect, and is as follows:—

"The procedure herein prescribed shall be followed as far as it can be made applicable in all proceedings in any Court of civil jurisdiction other than suits and appeals."

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1. (1894) 5 M.L.J. 3: L.R. 22 I.A. 44: I.L.R. 17 All. 106 (P.C.).

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In Mulla's Code of Civil Procedure, 10th edition, at page 409, in the notes to S. 141, it is stated that this section does not apply to proceedings in execution, and a number of authorities decided under the present Code of Civil Procedure are quoted in support of that statement. In *T. Wang* v. *Sona Wangdi*[1], an application for execution of a money decree, objection was taken by the judgment-debtor that the decree was satisfied out of Court, and the matter was referred to arbitration at the instance of both parties, and an award was published. The reference to arbitration was made under the provisions of S. 1 (1) of the II schedule to the Code which provides that

"Where in any suit all the parties interested agree that any matter in difference between them shall be referred to arbitration they may, at any time before judgment is pronounced, apply to the Court for an order of reference."

It is to be noticed that reference to arbitration is to be made "in any suit". At page 563 of the judgment in the above Calcutta case, it is stated:

"As has been explained in *Hari Charan* v. *Manmatha*[2], the law is the same as it was under S. 647 of Code of 1882 which expressly excluded execution proceedings from those to which provisions relating to suits were extended. The view that special procedure in suits do not apply to execution of decrees is based on the supposition that O. 21 relating to executions is self-contained and exhaustive as to the special subject with which it deals."

It was held that the Court was not competent to refer a matter in execution to arbitration. In *Alagasundaram Pillai* v. *Pichuviers*[3], Wallace, J., in delivering the opinion of the Court, at page 912, said:

"An application under the execution O. 21 will *ex facie* be an application for execution. Besides this, the general trend of authority which has interpreted the leading Privy Council case on this section or rather on the old S. 647 corresponding, namely, *Thakur Parshad* v. *Sheikh Fakir-ul-lah*[4] is against the idea that S. 141 applies to execution proceedings at all. The Privy Council laid down that the old S. 647 was intended to exclude from its purview the whole of the old Chapter XIX which is devoted to the procedure in execution."

Later on, at page 913, the learned Judge said:

"It is, therefore, obvious that S. 141 does not apply to such proceedings under O. 21 as are not also proceedings under S. 47."

Those words appear to have caused a contention to have been put forward that if execution proceedings could be brought

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1. (1924) I.L.R. 52 Cal. 559.
2. (1913) I.L.R. 41 Cal. 1.
3. (1929) 57 M.L.J. 381: I.L.R. 52 Mad. 899 (F.B.).
4. (1894) 5 M.L.J. 3: L.R. 22 I.A. 44: I.L.R. 17 All. 106 (P.C.).

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within S. 47, Civil Procedure Code, then the other provisions of the Code would apply to such applications. In *Arunachalam* v. *Veerappa Chettiar*[1], the effect of the words quoted above from *Alagasundaram Pillai* v. *Pichuvier*[2] was considered. It was pointed out that these observations were *obiter* and that the matter was not argued before the Court in which the observations were made, and at page 24, Sir Owen Beasley, C.J., who delivered the opinion of the Court, said:

"It is beyond dispute that such an *ex parte* order as was passed in these execution proceedings is a decree within the provisions of S. 47, but it does not follow that the provisions of O 9, r. 13 apply to such a decree. If O. 9, r. 13 applies only to suits, then the fact that such an *ex parte* order is a decree within the provisions of S. 47 is of no real assistance to the defendant."

The Court disapproved of the view that if an application in execution could be brought within the provisions of S. 47, then the other provisions of the Code applicable to suits would apply to proceedings in execution. O. 9, r. 13 of the Code deals with setting aside of *ex parte* decrees. In the present application, it was not argued before me that the proceedings in the lower Court were within the provisions of S. 47 of the Code. I have however referred to the last two mentioned authorities in order to show how an attempt to get over the decision of the Privy Council in *Thakur Parshad* v. *Sheikh Fakir-ul-lah*[3] and other decisions has failed.

In the light of the authorities to which I have referred I must hold that the provisions of O. 26, r. 4 are not applicable to execution proceedings and have not been made so by reason of the provisions of S. 141. Whilst many of the decisions in which it has been held that the general provisions of the Code do not apply to execution proceedings are in respect of those which adversely affected the parties and if they had applied would have placed them under some disability, I can see no reason to hold that a provision which would assist should be treated any differently to the others. It follows therefore that the order of the learned Subordinate Judge directing the issue of a commission warrant to obtain the evidence of two witnesses on interrogatories under the provisions of O. 26, r. 4, Civil Procedure Code, was made without jurisdiction. This rule, in its language, empowers a Court to issue a commission in any suit. The

1. (1931) 61 M.L.J. 348: I.L.R. 55 Mad. 17 (F.B.).
2. (1929) 57 M L J. 381: I.L.R. 52 Mad 899 at 912 (F.B.).
3. (1894) 5 M.L.J. 3: L.R. 22 I.A. 44: I.L.R. 17 All. 106 (P.C.).

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application in the execution proceedings by the respondent to be brought on record as the transferee decree-holder was neither a proceeding in a suit nor an original proceeding as contemplated by their Lordships of the Privy Council in *Thakur Parshad* v. *Sheikh Fakir-ul-lah*[1].

Learned counsel on behalf of the petitioner had a further objection to the correctness of the order of the learned Subordinate Judge, namely, that he had no jurisdiction to direct the evidence of witnesses to be taken by interrogatories. It is unnecessary for me to deal with this further objection by reason of the conclusion to which I have arrived regarding the applicability of O. 26, r. 4 to proceedings in execution.

The result is, this Civil Revision Petition is allowed and the order of the learned Subordinate Judge set aside. The petitioner is entitled to his costs.

K.C. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Krishna Rao .. *Petitioner** (*Petitioner*)

v.

Janaki Ammal and others .. *Respondents* (*Respondents*).

Krishna Rao v. Janaki Ammal.

Civil Procedure Code (V of 1908), O. 9, r. 9 and S. 141—Pauper petition—Dismissal for default—Petition under O. 9, r. 9 and S. 141—Duty of Court.

Where on the dismissal for default of a pauper petition a petition is filed under O. 9, r. 9 and S. 141, Civil Procedure Code, the Court has a duty to decide such a petition on its merits and cannot decline to exercise its jurisdiction merely because there is an alternative remedy.

Subbaraya Devai v. *Sundaresa Devai*, (1932) 36 L.W. 586, relied on.

Petition under S. 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Subordinate Judge of Tanjore dated 18th September, 1935, in I. A. No. 77 of 1935 in O.S. No. 341 of 1931.

K. Rajagopala Aiyar and *P. G. Raghavendra Rao* for Petitioner.

R. Gopalaswami Aiyangar for Respondents.

The Court delivered the following

JUDGMENT.—It seems to me that the lower Court was wrong in declining to consider this application on the merits.

1. (1894) 5 M.L.J. 3: L.R. 22 I.A. 44: I.L.R. 17 All. 106 (P.C.).

* C.R.P. No. 624 of 1936. 24th February, 1939.

Krishna Rao v. Janaki Ammal.

The case of *Subbaraya Devai* v. *Sundaresa Devai*[1] is authority for the view that O. 9, r. 9 read along with S. 141, Civil Procedure Code, does apply to pauper petitions. There is a conflict of authority on the question whether the dismissal for default of a pauper petition bars a future petition on the same grounds. But whether the decision operates as *res judicata* or not, if the Court has jurisdiction to decide a petition under O. 9, r. 9 and S. 141, it has a duty to decide such a petition on its merits and cannot decline to exercise its jurisdiction merely because there is an alternative remedy. The petition is allowed and the case is remanded to the lower Court for disposal on the merits. Costs to abide the result.

K.C. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE LAKSHMANA RAO.

S. V. Subramania Pillai .. *Petitioner* (Accused)*

v.

G. J. Ponniah .. *Respondent (Complainant).*

Subramania Pillai v. Ponniah.

Indian Penal Code (XLV of 1860), S. 21—Public servant—Panchayat Board Sanitary Inspector authorised to collect fees—Whether a public servant.

The Sanitary Inspector of a Panchayat Board is not a public servant as defined in S 21 of the Indian Penal Code and the fact that the Sanitary Inspector in a case was authorised by the President of the Panchayat Board to collect fees for sealing animals before slaughter would not make him a public servant.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to quash the charge framed against him in C.C. No. 418 of 1938 on the file of the Court of the Taluq Magistrate of Sivaganga.

K. S. Jayarama Aiyar and *N. Shankar Bhat* for Petitioner.

V. T. Rangaswami Aiyangar for Respondent.

The Public Prosecutor (V.L. Ethiraj) for the Crown.

The Court made the following

ORDER.—The Sanitary Inspector of a Panchayat Board was held to be a public servant in *Queen-Empress* v. *Tiruvengada Mudali*[2], because of S. 43 of the Madras Local Boards Act

1. (1932) 36 L.W. 586.

*Crl. R.C. No. 881 of 1938. 24th February, 1939.
(Crl. R. P. No. 839 of 1938).

2. (1898) I.L.R. 21 Mad. 428.

Subramania Pillai v. Ponniah.

(V of 1884) which has been deleted in the Madras Local Boards Act of 1920 (Act XIV of 1920) and it is not contended that as such officer, a Sanitary Inspector has any of the duties specified in cl. 10 of S. 21 of the Indian Penal Code. It follows therefore that the Sanitary Inspector of a Panchayat Board is not a public servant as defined in S. 21 of the Indian Penal Code and the fact that the Sanitary Inspector in this case was authorised by the President of the Panchayat Board to collect fees for sealing animals before slaughter would not make him a public servant. The charge framed under S. 353 of the Indian Penal Code is therefore quashed and the Magistrate will proceed with the case according to law on the footing that the Sanitary Inspector is not a public servant.

K.C. ——— *Charge quashed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Appellate Jurisdiction.]

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE MADHAVAN NAIR.

Khadar Mohideen Sahib .. *Appellant** (*Applicant*)

v.

C. Nagu Bai *alias* Seetha Bai and others .. *Respondents* (*Respondents*).

Khadar Mohideen Sahib v. Nagu Bai.

Mortgage—Equitable mortgage—Appointment of receiver in mortgage suit—Prior appointment as receiver in execution of money decree by stranger—Rents and profits—Preferential rights to—Mortgagee's rights—If destroyed by not bringing the properties to sale earlier.

The question raised in the appeal was whether the holder of a money decree or an equitable mortgagee has preferential rights in the profits of mortgaged properties when a receiver has been appointed at the instance of the holder of the money decree in execution proceedings and also appointed to act in a suit instituted by the mortgagee to enforce his mortgage.

Held, as an equitable mortgagee is entitled as against the mortgagor to the rents and profits of the mortgage security if it is insufficient for the discharge of the mortgage debt and as the holder of a money decree who obtains the appointment of a Receiver (where the order of appointment creates no charge) is not in the position of a secured creditor the equitable mortgagee has the better title when there is a contest between the two.

Case-law discussed.

Maharajah of Pittapuram v. *Gokuldoss Goverdhandoss*, (1931) 61 M.L.J. 111: I.L.R. 54 Mad. 565, applied.

If the mortgagee is entitled to the profits the fact that he has not brought the properties to sale earlier cannot destroy his rights.

* O. S. A. No. 74 of 1937. 7th November, 1938.

Khadar Mohideen Sahib *v.* Nagu Bai.

On appeal from the judgment and order of the Hon'ble Mr. Justice Gentle dated 11th October, 1937, and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Application No. 865 of 1936 in C. S. No. 422 of 1929.

M. Appalachariar and *K. V. Rangachari* for Appellant.

K. Narasimha Aiyar and *S. Muthiah Mudaliar* for Respondents.

The Court delivered the following

Leach, C. J.

JUDGMENTS. *The Chief Justice.*—This appeal raises the question whether the holder of a money decree or an equitable mortgagee has preferential rights in the profits of mortgaged properties when a receiver has been appointed at the instance of the holder of the money decree in execution proceedings and also appointed to act in a suit instituted by the mortgagee to enforce his mortgage. In order to understand the position it is necessary to state the facts in some detail. In Suit No. 422 of 1929 on the Original Side of this Court the first respondent obtained a decree on a promissory note against the members of a joint Hindu family consisting of two brothers, Aiya Mudaliar and Muthu Mudaliar, and Sambanda Mudaliar, the son of Aiya Mudaliar. On the 16th March, 1929, certain immovable properties belonging to the defendants in the suit were mortgaged to the Mercantile Bank of India, Limited, by the deposit of the title deeds. In 1930 the Bank sued in Suit No. 537 of 1930 on the Original Side of this Court to enforce its mortgage and on the 5th August, 1931, it obtained a preliminary mortgage decree for Rs. 1,04,888-2-4. On the 24th November, 1931, the Court passed a final decree in the mortgage suit and on the 3rd February, 1933, the bank assigned its decree to the appellant. On the 6th November, 1930, the first respondent applied for the appointment of a receiver of the rents and profits of the mortgaged properties on the ground that it was considered more than doubtful that a sale of the properties would be sufficient to discharge the mortgaged debt and on 15th December, 1930, the application was granted. On the 14th August, 1931, the bank applied for the appointment of a receiver in the mortgage suit in order to safeguard its own interests. This application came before Stone, J., who on the 16th October, 1931, passed an order the effect of which was to make the receiver in suit No. 422 of 1929 also the receiver in the mortgage suit. The

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learned Judge directed that the rents and profits of the properties should be paid into Court to the joint credit of the decree-holders, that is, to the credit of the first respondent and the bank, and that the money should not be paid out without the further direction of the Court. The learned Judge gave no decision on the question of the rights of the parties with regard to the receiver's collection. He reserved this question for consideration until an application for payment out was made.

On the 30th March, 1931, Muthu Mudaliar, the second brother, was adjudicated an insolvent, and on the 10th November, 1931, an order for adjudication was made against Aiya Mudaliar, the elder brother. On the 27th November, 1933, the first respondent applied for payment out to her of a sum of Rs. 7,376 which the receiver had paid into Court. Notice of this application was given to all parties interested in the matter. On the 12th October, 1934, Lakshmana Rao, J., directed that the first respondent should be paid a sum of Rs. 1,737-10-9 representing the monies collected by the receiver before the 16th October, 1931, the date on which the receiver was also appointed to act as the receiver in the mortgage suit. The learned Judge held that the Official Assignee was entitled to the amount representing the share of the second brother in the money collected between the 30th March, 1931, the date when the younger brother was adjudicated, and the 10th November, 1931, the date on which the elder brother was adjudicated. No appeal was preferred against this order.

On the 20th December, 1934, the first respondent applied to the Court for payment to her of a sum of Rs. 3,454-6-0 which was said to represent the share of Sambanda Mudaliar, the son of the elder brother, in the monies lying in Court. The Master granted the application, to the extent of Rs. 3,148-2-7 and his order was confirmed by Gentle, J., on appeal. The present appeal is from the order of Gentle, J. The learned Judge considered that the appellant was not justified in standing by for six years and allowing the rents and profits to be accumulated and relied on an observation of Reilly, J., in *Ponnu Chettiar* v. *Sambasiva Aiyar*[1], to the effect that in this country

1. (1932) 64 M.L.J. 682: I.L.R. 56 Mad. 546.

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a simple mortgagee cannot by getting a receiver appointed in the course of a suit enlarge his security or enlarge his rights to the prejudice of third parties in the equity of redemption.

In order to realise his security an equitable mortgagee must in India bring a suit on his mortgage and obtain a decree for sale. In England it has long been recognised that when an equitable mortgagee takes action to enforce his security he is entitled in certain circumstances to the appointment of a receiver in respect of the rents and profits of the mortgaged property. The Court has a discretion in the matter but ordinarily when there has been default in the payment of interest, or the security is likely to be insufficient to discharge the mortgage debt or is in jeopardy a receiver is appointed as a matter of course. Where a receiver has been appointed at the instance of a puisne mortgagee he will only act for the benefit of the puisne mortgagee if the prior mortgagee does not himself apply for the appointment of a receiver. If the prior mortgagee does apply for the appointment of a receiver he will be entitled to an order in supersession of the order obtained by the puisne mortgagee. (See *Fairweather* v. *Metropolitan Amalgamated Estates, Limited*[1].) The holder of a money decree who has obtained an order for the appointment of a receiver does not become a secured creditor merely because a receiver has been appointed, and the order, unless it creates a charge, will not prevail against a trustee in bankruptcy. (In re *Dickinson*: Ex parte *Charrington & Co.*[2], In re *Potts*: Ex parte *Taylor*[3], In re *Marquis of Anglesey*: *Countess de Galve* v. *Gardner*[4], and In re *Pearce* Ex parte *The Official Receiver, the Trustee*[5]:)

The principles on which the Courts in England have acted have been recognised in this country. In *Maharajah of Pittapuram* v. *Gokuldoss Goverdhandoss*[6], my learned brother Madhavan Nair, J., held that where a receiver has been appointed at the instance of an equitable mortgagee the mortgagee possesses a preferential right in the rents and profits as against the ordinary creditors of the mortgagor. This decision was quoted with evident approval by a Full Bench

1. (1912) 2 Ch. 497.
2. (1888) 22 Q.B.D. 187.
3. (1893) 1 Q.B. D. 648.
4. (1903) 2 Ch. 727.
5. (1919) 1 K.B. 354.
6. (1931) 61 M.L.J. 111: I.L.R, 54 Mad. 565.

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of this Court in *Paramasivan Pillai* v. *Ramasami Chettiar*[1], where it was held that the Court had jurisdiction to order the appointment of a receiver in a suit to enforce a simple mortgage. In *Rameshwar Singh* v. *Chuni Lal Shaha*[2], a Bench of the Calcutta High Court accepted the principle laid down in *Penney* v. *Todd*[3], that the possession of a receiver in a mortgage suit is *prima facie* for the benefit of the party who has obtained the appointment. The Court considered that a receiver who was appointed at the instance of a party must hold the property for his benefit alone and was bound to make over to him the entire income in discharge of his dues. The Rangoon High Court has also recognised the rights of an equitable mortgagee to the rents and profits of the mortgaged property after action has been taken. See *Aga G. Ally Ramzan Yezdi* v. *Balthazar & Son, Ltd.*[4] and *S.C. Venkanna* v. *Mangammal*[5].

As an equitable mortgagee is entitled as against the mortgagor to the rents and profits of the mortgage security if it is insufficient for the discharge of the mortgage debt and as the holder of a money decree who obtains the appointment of a receiver is not in the position of a secured creditor, I am of the opinion that the equitable mortgagee has the better title when there is a contest between the two. I am, of course, referring to a case where the order of appointment contains no charge and the creditor merely stands in the shoes of his judgment-debtor. If the law requires a puisne mortgagee to give way to a prior mortgagee when the latter applies for the appointment of a receiver it seems to me that an ordinary judgment-creditor must give way to one who has a charge on the property, and this is the effect of the decision in *Maharajah of Pittapuram* v. *Gokuldoss Goverdhandoss*[6]. Applying these principles, I consider that the Court must hold that the appellant is entitled to the sum which the first respondent wishes to withdraw from the Court if it is clear that the mortgaged properties are not sufficient to pay the mortgage debt. It would appear that they are not sufficient, but this must be ascertained with certainty before any order for payment out is made. If the

1. (1933) 65 M.L.J. 222: I.L.R. 56 Mad. 915 (F.B.).
2. (1919) I.L.R. 47 Cal. 418.
3. (1878) 26 W.R. (Eng.) 502.
4. (1936) I.L.R. 14 Rang. 292.
5. (1936) I.L.R. 14 Rang. 308: A.I.R. 1936 Rang. 296 (F.B,).
6. (1931) 61 M.L.J. 111: I.L.R. 54 Mad. 565.

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appellant is entitled to the rents and profits, I do not consider that the fact that he has not brought the properties to sale earlier can destroy his right. I mention this because much has been made of the fact that the appellant has so far neglected to exercise his right to bring the mortgaged properties to sale. The first respondent could herself have brought the properties to sale in execution proceedings had she desired, but the sale would, of course, have been subject to the mortgage.

We will allow the appeal and set aside the order for payment out to the first respondent of the sum of Rs. 3,143-2-7, but subject to the observations which follow. The Court has been given to understand that the appellant is prepared to bring the mortgaged properties to sale under his final decree, and if this is done the position with regard to the sufficiency or otherwise of the security will be manifest. If the appellant does not within a reasonable time from the date of this judgment convince the Court that the mortgaged properties and the rents and profits thereof are insufficient to discharge his debt, the Court will be justified in directing payment out to the first respondent of the sum in question, provided, of course, that her decree remains unsatisfied. The appellant cannot be permitted to leave the question of the sufficiency of his security in doubt indefinitely.

The case will be remitted to the Original Side to be dealt with in the light of this judgment. As the appellant has been dilatory we make no order as to costs.

Madhavan Nair, J.

Madhavan Nair, J.—I agree and I have nothing special to add to the judgment delivered by my Lord the Chief Justice; but I would like to say a few words about my decision in *Maharajah of Pittapuram* v. *Gokuldoss Goverdhandoss*[1] referred to in my Lord's judgment. That decision is ample authority for the position that an equitable mortgagee of properties at whose instance a receiver has been appointed by Court will have in the event of his security proving insufficient a preferential right as against the ordinary creditors of the mortgagor to any monies realised by the receiver from the properties. In that case, however, the contest was between the equitable mortgagee who had obtained a decree on his equitable mortgage and the Official Assignee who represented the mortgagor who had become an insolvent. I held that the claim of the equitable

1. (1931) 61 M.L.J. 111: I.L.R. 54 Mad. 565.

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mortgagee prevailed over that of the Official Assignee representing the general body of creditors. In *Ponnu Chettiar* v. *Sambasiva Aiyar*[1], it was held that the effect of the order appointing a receiver in a suit to enforce as simple mortgage is to deprive the mortgagor of his right to deal with the income of the property over which the receiver is appointed and that the mortgagor cannot defeat the order by assigning the profits to a third party and a purchaser of the mortgagor's right, title and interest in the property over which the receiver is appointed, in execution of a money decree obtained by him against the mortgagor is no more entitled than the mortgagor to the income of the property realised by the receiver. The learned Counsel for the appellant argued in support of the position that the simple mortgagee who got the receiver appointed in that case could not put forward any claim as against the appellant to the income realised by the receiver. In the course of the arguments he relied upon In re *Dickinson*: Ex parte *Charrington & Co.*[2], In re *Potts*: Ex parte *Taylor*[3], In re *Pearce*: Ex parte *The Official Receiver, the Trustee*[4] and contended that the effect of the order appointing a receiver is not to create a lien in favour of the mortgagees. These cases were held inapplicable by Venkatasubba Rao, J., one of the learned Judges who decided that case on the ground that they dealt with the special provisions of the Bankruptcy Act. Incidentally, the learned Judge expressed a doubt whether my decision in *Maharajah of Pittapuram* v. *Gokuldoss Goverdhandoss*[5] is correct or not as the claimant in that case whose right was negatived by me was the Official Assignee. What I propose respectively to say has reference to this doubt; but as the point does not directly arise in the present case, I shall be very brief. In those English cases referred to, the persons who obtained the appointment of receivers were simple money creditors and had no charge over the property and their general rights if they were mortgagee decree-holders did not arise for consideration. That this aspect of the question is of importance will appear from the observations of two of the learned Judges Lord Esher, M.R. and Fry,

1. (1932) 64 M.L.J. 682: I.L.R. 56 Mad. 546.
2. (1888) 22 Q.B.D. 187.
3. (1893) 1 Q.B.D. 648.
4. (1919) 1 K.B. 354.
5. (1931) 61 M.L.J. 111: I.L.R. 54 Mad. 565.

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L.J., who heard the appeal in In re *Dickinson*: Ex parte *Charrington & Co.*[1] Lord Esher, M.R., observed:

"I think that the case does not come within sub-S. (2) (S. 9 of the English Bankruptcy Act) for the appellants have neither a mortgage, charge nor lien upon any part of the property of the debtor."

Fry, L.J., observed as follows:

"It is admitted that they do not hold any 'mortgage' on the property of the debtor."

Then they went on to consider the question whether the orders appointing the receiver created a charge making the judgment-creditor a secured creditor within the meaning of S. 9 of the Bankruptcy Act. In the other two cases also the question considered was the same. For the purposes of this case it is not necessary to quote the orders under which the receivers were appointed in those cases. It will be sufficient to observe that the learned Judge interpreted the orders to mean that the property of the judgment-debtors was to be placed in the custody of the receiver to be held by him as the agent for the Court and at its disposal to be used subject to its orders. From this standpoint the question for consideration was has the order appointing a receiver created a charge or lien in favour of the creditor over the property in his custody? In re *Potts*: Ex parte *Taylor*[2], Esher, M.R., pointed out that

"An order appointing a receiver can only amount to a charge, if it charges the person in whose hands the money is, not to deal with it except in one way,"

And that must mean, said the Master of the Rolls in In re *Pearce*: Ex parte *The Official Receiver, the Trustees*, "except to pay it or to hold it for the execution creditor".[3] The question therefore reduces itself to one of interpretation of the order passed by the Court. In *Maharajah of Pittapuram* v. *Gokuldoss Goverdhandoss*[4], besides referring to the arguments advanced on the general principles arising from the position of the decree-holder as equitable mortgagee, I drew attention also to the order of the learned Judge appointing the receivers—the only point that received and could receive attention at the hands of the learned Judges in the English cases already referred to. In that case the order stated that the receiver "shall pay the net receipts into Court to the credit of this suit"—C.S. No. 229 of

1. (1888) 22 Q.B.D. 187. 2. (1893) 1 Q.B.D. 648.
3. (1919) 1 K.B. 354 at 363.
4. (1931) 61 M.L.J. 111; I.L.R. 54 Mad. 565.

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1924—the suit instituted by the equitable mortgagee in which he eventually obtained a decree. It seemed to me that according to this order, the money in the hands of the receiver was not to be dealt with "except in one way", that is, except to put it to the "credit of this suit" which means to the credit of the mortgagee decree-holder in the event of his success in the case and to no one else. According to this interpretation, it follows that the mortgagee decree-holder in the *Maharajah of Pittapuram* v. *Gokuldoss Goverdhandoss case*[1] was in the position of a secured creditor, as against the Official Assignee and that he could not therefore claim any preferential right to the money in the hands of the receiver. It will be clear from pages 570 and 571 that my decision in that case was based both on general principles as well as upon the order appointing receiver, but the former point happened to be more elaborated in view of the arguments advanced. For the reasons which I have briefly indicated above, I would say respectfully that it does not appear to me that the correctness of my decision in *Maharajah of Pittapuram* v. *Gokuldoss Goverdhandoss*[1] is open to doubt on the strength of the English decisions referred to, unless my interpretation of the order appointing the receiver in *Maharajah of Pittapuram* v. *Gokuldoss Goverdhandoss*[1] is held to be wrong. I may also add that the general question did not fall to be decided in the three English cases referred to.

K.S. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING.

Uthuman Pillai Tharagan and others .. *Appellants** (*Defendants 5 to 7*)

v.

T. Muhammad Usuf Tharaganar and others .. *Respondents* (*Plaintiffs 1 to 4 and Defendants 3, 4, 8 and 9*).

Uthuman Pillai Tharagan *v.* Muhammad Usuf Tharaganar.

Civil Procedure Code (V of 1908), S. 149 and O. 33, r. 15—Leave to sue in forma pauperis*—Refusal—If application to be treated as plaint on payment of court-fees—O. 33, r. 15—Necessity for strict compliance with—Date when suit to be deemed to have been filed.*

1. (1931) 61 M.L.J. 111 : I.L.R. 54 Mad. 565.

* A. A. O. No. 413 of 1936. 24th October, 1938.

Uthuman Pillai Tharagan v. Muhammad Usuf Tharaganar.

An application of 30th July, 1930, for leave to sue in *forma pauperis* was refused on 21st August, 1931, and the plaintiffs were directed to pay costs of the first defendant. Plaintiffs asked for time to pay court-fees and the matter was adjourned to 30th September, 1931, on which date court-fee was paid and the petition registered as a plaint. On April, 1933, the first defendant raised a fresh ground of defence that as plaintiffs had not paid his costs they were debarred by O. 33, r. 15 from maintaining the suit. On 30th August, 1933, plaintiffs paid the costs into Court.

Held, S. 149 cannot empower any Court after refusing to allow a petitioner to sue in *forma pauperis* to pay court-fee and treat his application as a plaint. If such a petitioner files a suit, whether with the original document contained in his petition or with a plaint subsequently drafted, he can do so only by strict compliance with the provisions of O. 33, r. 15, under which rule alone the suit comes into existence.

Chunna Mal v. *Bhagwant Kishore*, A.I.R. 1936 All. 584 (F.B.) and *Ma Saw Yin* v. *S. P. K. A. A. M. Firm*, A.I.R. 1937 Rang. 185, followed.

Case-law discussed.

Even though O. 33, r. 15 is imperative a suit in which the costs have in fact been paid must be treated as one instituted on the day on which the costs were paid (30th August, 1933).

Ramakrishna Nadar v. *Ponnaya Thirumalai Vandaya Thevar*, (1935) 69 M.L.J. 791, followed.

Appeal against the order of the District Court of Tinnevelly dated 20th August, 1936 and made in A. S. No. 397 of 1935 preferred against the decree of the Court of the Subordinate Judge of Tinnevelly dated 22nd July, 1935, in O. S. No. 58 of 1931.

K. R. Rangaswamy Aiyangar for Appellants.

K. Venkateswaran for Respondents.

The Court delivered the following

JUDGMENT.—The plaintiffs in O. S. No. 58 of 1931 on the file of the Subordinate Judge of Tinnevelly began legal proceedings against the defendants by applying on 30th July, 1930, for permission to sue them in *forma pauperis*. That permission was refused on 21st August, 1931, by an order which also directed the plaintiffs to pay the defendant 1's costs. As soon as this order was pronounced plaintiffs asked for time to pay court-fee. The matter was adjourned to 30th September, 1931. On that day court-fee was paid, and the petition registered as a plaint. In April, 1933, defendant 1, who had said nothing about his costs in his original written statement applied for permission to raise a fresh ground of defence, namely, that as plaintiffs had not paid his costs they were debarred by the provisions of O. 33, r. 15 from maintaining the suit. This permission was granted, and a new issue framed. On 30th August, 1933, plain-

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tiffs paid the costs into Court. The learned Additional Subordinate Judge then proceeded to try the new issue and held that the suit was not maintainable. On appeal the learned District Judge of Tinnevelly reversed the decision on this issue and remanded the suit for trial on the other issues. Against that order of remand the present Civil Miscellaneous Appeal has been filed.

The decision of the appeal depends mainly upon the interpretation of two provisions in Civil Procedure Code.

The first is O. 33, r. 15, which runs as follows:—

> An order refusing to allow the applicant to sue as a pauper shall be a bar to any subsequent application of the like nature by him in respect of the same right to sue; but the applicant shall be at liberty to institute a suit in the ordinary manner in respect of such right, provided that he first pays the costs (if any) incurred by the Government and by the opposite party opposing his application for leave to sue as a pauper.

and the second is S. 149, which runs as follows:—

> Where the whole or any part of any fee prescribed for any document by the law for the time being in force relating to court-fee has not been paid, the Court may, in its discretion, at any stage, allow the person, by whom such fee is payable, to pay the whole or part, as the case may be, of such court-fee; and upon such payment the document, in respect of which such fee is payable, shall have the same force and effect as if such fee had been paid in the first instance.

The argument of the learned Counsel for the respondents is that O. 33, r. 15 applies only to the filing of a fresh plaint, and not to the conversion into a plaint of the particulars which O. 33, r. 2 prescribes must accompany the application for permission to sue as a pauper. For the purposes of S. 149 it is further argued, such particulars can be regarded as already constituting a plaint upon which the whole court-fee has not been paid, and in the present case the Court has rightfully under the powers which S. 149 confers upon it permitted the plaintiffs on 30th September, 1931, to pay the whole of the court-fee. The argument for the appellants, on the other hand, is that the action of the plaintiffs on 30th September, 1931, in paying the court-fee and utilising as their plaint the particulars which they had already given in their petition amounts to 'instituting a suit in the ordinary manner' within the meaning of those words in O. 33, r. 15 that no plaint was pending before the learned Subordinate Judge on 30th September, 1931, or even on 21st August itself when the adjournment was granted as he had already refused permission to sue in *forma pauperis*; that S. 149 cannot therefore apply; and that the provisions of O. 33, r. 15 alone

follow, and inevitably follow, the order under O. 33, r. 7 dismissing plaintiffs' application. Uthumiah Pillai Tharagan v. Muhammad Usuf Tharaganar.

For the position that the provisions of S. 149 apply to the present facts the learned Advocate for the respondents relies upon three rulings—*Mrinalini Debi* v. *Tinkauri Debi*[1], *Balaguru Naidu* v. *Muthuratnam Aiyar*[2] and *Bir Ram* v. *Lachmi Rai*[3]. Of these the first which is a Bench decision, does not specifically refer to S. 149, but lays it down that the provisions of O. 33, r. 15 should be relaxed in favour of a plaintiff on whom no specific demand had been made to pay the costs awarded against him in the order dismissing his application for permission to sue in *forma pauperis*. This ruling however does not decide, as it was bound to decide if it were accepted that S. 149 applied, what was the date of the institution of the suit. *Balaguru Naidu* v. *Muthuratnam Aiyar*[2] is the decision of a single Judge, contained in a brief judgment in which no mention appears of any possible argument to the contrary. *Bir Ram* v. *Lachmi Rai*[3] is again the authority of a single judge, and again seems to assume that only one view is possible. The arguments relating to S. 149 are contained in the last paragraph of that judgment, and were really unnecessary for the decision of the case before the learned Judge, where the principal reason for holding O. 33, r. 15 inapplicable was the absence of any formal order specifying the *amount* of costs which plaintiff as petitioner in the pauper application had to pay.

Such is the state of the authorities relied on by the respondents. They can hardly, with respect, be called convincing. Against them the learned Advocate for the appellants has cited, amongst others, two very recent rulings, one of a Full Bench of the Allahabad High Court (*Chunna Mal* v. *Bhagwant Kishore*[4]) and one of a Bench of the Rangoon High Court (*Ma Saw Yin* v. *S. P. K. A. A. M. Firm*[5]). The judgment of the majority on the Full Bench and the Rangoon judgment examine and analyse elaborately the provisions of S. 149, O. 33, r. 15 and other relevant rules, and also all the previous authorities and their conclusion is that S. 149 cannot empower any Court after refusing to allow a petitioner to sue in *forma pauperis*, to pay court-fee and treat his application as a plaint. If such a

1. (1912) 16 C.W.N. 641.
2. (1923) 46 M.L.J. 254.
3. A.I.R. 1937 All. 781.
4. A.I.R. 1936 All. 584 (F.B.).
5. A.I.R. 1937 Rang. 185.

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petitioner files a suit, whether with the original document contained in his petition or with a plaint subsequently drafted, he can do so only by strict compliance with the provisions of O. 33, r. 15, under which rule alone the suit comes into existence. I need not set out the reasoning adopted by the learned Judges in these rulings. I need only say that I respectfully agree with them. I hold accordingly that S. 149 does not apply to the facts of this case, and that when court-fee was paid by the plaintiffs on 30th September, 1931, the suit was not properly instituted under O. 33, r. 15.

It does not however necessarily follow that at the time when he delivered his judgment dismissing the suit on that ground, the learned Subordinate Judge was right. Respondents have a second line of defence, based upon *Ramakrishna Nadar v. Ponnaya Thirumalai Vandaya Thevar*1. That is a judgment of a Bench of this Court which is binding upon me, and according to it even though O. 33, r. 15 is imperative, a suit in which these costs have in fact been paid must be treated as one instituted on the day on which the costs were paid. Applying this ruling to the facts of the present case I must hold that the suit in question was validly instituted on 30th August, 1933. It is necessary therefore to remand the suit, as the learned District Judge has done for trial on the other issues, and this appeal is formally dismissed with the modification already made as to the date on which the suit is to be deemed to have been instituted. There will be no order for costs in this appeal, or in the lower appellate Court. Costs of the suit will abide the result.

K. S. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Penubolu Seshiah and Thanniru Venkatrayulu represented by Penubolu Seshiah and another.. *Petitioners* (Petitioners)*

v.

Ayitha Ramiah and others .. *Respondents (Respondent Nos. 5 to 8).*

Seshiah v. Ramiah.

Executors—Estate of deceased—Executors de son tort paying off their own debts—Execution application by creditor having decree against assets of

1. (1935) 69 M.L.J. 791.

* C. R. P. No. 981 of 1936. 20th February, 1939.

deceased—Direction to executors to refund amount—Right of executors to retain assets proportionate to their debts—Plea of plene administravit—*Succession Act, 1925, S. 304.*

Seshiah v. Ramiah.

Where certain executors *de son tort* were shown to have taken possession of the estate of a deceased person and distributed the assets rateably amongst certain creditors without including the petitioner as a creditor, and the petitioner, who had a money decree against the estate of the deceased in the hands of his widow, applied for execution and therein proved that the executors *de son tort* had paid off their own debts out of the assets of the deceased,

Held, that the Court should direct the executors *de son tort* to pay to the petitioner the rateable amount which would have been due to him had his debt been taken into consideration at the distribution of the assets of the deceased among the creditors shortly after his death.

Held, however, that the executors *de son tort* should not be required to refund any amount which they had paid towards their own debts which was not in excess of the rateable amount to which they were entitled.

Narayanasami Pillai v. *Abbayi Sait,* (1905) I.L.R. 28 Mad. 351, considered.

Petition under S. 25 of Act IX of 1887, praying the High Court to revise the order of the Court of the District Munsif of Nellore dated 20th February, 1936 and made in E. P. No. 1130 of 1935 in S. C. S. No. 1307 of 1934.

V. Govindarajachari and *N. Vasudeva Rao* for Petitioners.

Ch. Raghava Rao, S. Rajaraman and *S. Kothandarama Nayanar* for Respondents.

The Court delivered the following

JUDGMENT.—This petition arises out of the execution of a Small Cause decree against the assets of a dead man. In the suit the first defendant was his widow and defendants 5 to 8 were certain intermeddlers with the estate of the deceased after his death. They appear to have taken possession of the stock-in-trade of the deceased and distributed it rateably amongst certain creditors without including the present petitioner as one of those creditors. There are also other defendants who were exonerated. The trial Court found on the strength of *Narayanasami Pillai* v. *Abbayi Sait*[1] that defendants 5 to 8 must be regarded as executors *de son tort* to whom the plea of *plene administravit* was not open, they having paid off their own debts without paying the debts of others. The result of the suit was a decree against the assets of the deceased in the hands of the first defendant and also against "such assets or their value as have been in the possession" of defendants 5 to 8.

1. (1905) I.L.R. 28 Mad. 351.

Seshiah *v.* Ramiah.

The extent of the assets and the extent of the liability of defendants 5 to 8 in respect of those assets were left open to be considered in execution. In the course of execution the learned District Munsif has given a finding as to the value of the assets in the hands of defendants 5 to 8 and has held that the present petitioner was only entitled to a rateable share in those assets proportionate to this debt in comparison with the debts of other creditors. It is contended that this is wrong and that the order should have been for defendants 5 to 8 to bring into Court the full value of the assets of the deceased which had come into their hands, for the satisfaction of the petitioner's decree. It seems to me that this contention cannot be sustained. The judgment of the trial Court left open not only the extent of the assets of the deceased in the hands of defendants 5 to 8 but also the extent of their liability. The decision which I have quoted goes no further than to say that when an executor *de son tort* has paid his own debts he cannot answer a claim of another creditor who has not been paid by the plea of *plene administravit*. But it does not lay down any rule that when an executor *de son tort* has paid his own debts, a creditor who has not been paid is entitled to claim out of the assets which were originally in the hands of the executor *de son tort* a disproportionate payment towards his own debt. I see no reason in law or equity for the petitioner to get from the executors *de son tort* any more than they would have got had they been part-takers in the distribution of the assets of the deceased amongst the creditors shortly after his death. Defendants 5 to 8 made themselves liable under S. 304 of the Indian Succession Act for the assets after deducting payments made to the rightful executor or administrator and payments made in due course of administration. To the extent to which they have paid valid debts of the deceased proportionately to the assets available, those payments have in my opinion been made "in due course of administration". To the extent to which they have paid certain creditors more than the rateable share due to them, having regard to the claims of other creditors who were not paid at all, then clearly the payments were not made "in due course of administration", and the executors *de son tort* are liable to be required to refund the excess. It seems to me that the lower Court was quite right in directing defendants 5 to 8 to pay to the petitioner the rateable amount which would have been due to him had his

debt been taken into consideration at the distribution of the assets amongst the creditors made by defendants 5 to 8. I see no reason why defendants 5 to 8 should be required to refund any amount which they have paid towards their own debts which is not in excess of the rateable amount to which they were entitled. Seshiah v. Ramiah.

There is no substance in the other contentions put forward before me. The result therefore is that the petition is dismissed with costs of the contesting respondents.

B. V. V. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING AND MR. JUSTICE ABDUR RAHMAN.

Sithalingachetti minor by his next friend and mother Alamelu Ammal .. *Appellant* (Plaintiff)*

v.

Ardhanari Chetti and others .. *Respondents (Defendants).*

Sithalingachetti v. Ardhanari Chetti.

Guardian and Wards Act (VIII of 1890), S. 27—Guardian in possession of minor's properties—Purchase for minor of immovable properties—Purchase prudent—Guardian if trustee governed by S. 20 of Trusts Act—Trusts Act (II of 1882), Ss. 94 and 95—Effect of—Person entrusted with management by de jure *guardian—If* de facto *guardian or agent of guardian.*

A guardian of a minor, although he occupies a position which is fiduciary in character, cannot be held to be debarred from acquiring immovable property on behalf of his ward, provided in so doing he acts as a prudent man who is acting carefully with his own money. Though a guardian in possession of minor's property may fall under S. 94 of the Indian Trust Act, he could not be held in every case to come within S. 95 of the Act, as the words "so far as may be" in that section makes it subject to S. 27 of the Guardian and Wards Act.

Where therefore on the death of *A* leaving a divided brother *B* and a pregnant widow, who later gave birth to a son, *B* took possession of *A's* properties and managed them at the request of the widow and *A's* relations and in the course of management purchased some immovable properties with the consent of the widow (*de jure* guardian of the minor) and it was found to have then been a prudent act, though later depression in the market rendered it a losing bargain, the purchase is good and cannot be questioned by the minor. Also the position of *B* was more of an agent to the mother and *de jure* guardian and not a guardian himself, in which view the purchase with the consent of the principal and legal guardian was a complete reply to the action by the minor against *B* or his heirs.

Appeal against the decree of the Court of the Subordinate Judge of Coimbatore in O.S. No. 288 of 1933.

*Appeal No. 221 of 1935. 10th January, 1939.

Sithalingachetti v. Ardhanari Chetti.

C. S. Venkatachariar and *D. Ramaswami Aiyangar* for Appellant.

M. Patanjali Sastri and *V. Sambandam Chetti* for Respondents.

The judgment of the Court was delivered by

Abdur Rahman, J.

Abdur Rahman, J.—The only question which arises for decision in this appeal is whether the minor plaintiff appellant was bound to accept 1 acre 24 cents of wet lands purchased by his uncle Sinnia Chetti on the 14th November, 1927, for a sum of Rs. 2,950 out of the money belonging to the aforesaid minor.

The circumstances in which Sinnia Chetti came to be in possession of the minor's funds may be briefly stated. Sinnia Chetti and his brother Palaniswami Chetti were joint till March, 1920, when a partition was effected between them. Palaniswami Chetti died on the 2nd December, 1921, leaving a pregnant widow and a daughter. Sinnia Chetti appears to have been then asked by the other members of his family as well as that of the widow's to take charge of the properties left by Palaniswami and look after the existing daughter, the widow and the child when born (Ex. III). The widow subsequently gave birth to a son, who is the present plaintiff. In accordance with the arrangement arrived at shortly after Palaniswami's death, Sinnia Chetti took possession of the property left by his deceased brother, collected its income and continued to do so up till 1930 when he died. It was during this period, that is, in 1927 that the land in dispute was purchased by him from out of the minor's money which he had with him (Ex. I).

It has been admitted by the widow in her statement as a witness on behalf of the plaintiff that she and her father "used to go to Sinnia Chettiar once in a year or six months and ask him for accounts and see them." These accounts were filed in Court by defendant 1, who is the eldest son of Sinnia Chetti and after going through them and on a consideration of the other evidence in this case the learned Sub-Judge came to the conclusion that the land was purchased by Sinnia Chetti with the widow's knowledge and consent. This finding has not been challenged before us although the learned Counsel for the appellant has tried to show that the consent could not be said to have been validly given as the facts that a sum of Rs. 2,000 was not paid by Sinnia Chetti to the vendor at the time when the

purchase was made and that a promissory note for Rs. 2,000 executed by him, that is, Sinnia Chetti was given in part payment were deliberately withheld from the widow. The non-disclosure of these facts was immaterial in our opinion as it is quite possible that Sinnia Chetti may not have found it convenient at the moment to pay the money in cash and being a man of means the vendor was willing to accept a promissory note executed by him instead. The evidence on the record shows that the promissory note was duly discharged by Sinnia Chetti within about two months of its execution. Nothing else has been suggested to indicate that any material fact regarding the land to be purchased was kept back from the widow. The land was expected to bring a return of 5¼ per cent. on the money paid for its purchase and did so in 1928. There seemed to be nothing imprudent in the purchase of the land at the time. But for a subsequent depression in the value of immovable properties, this transaction would never have been questioned. Having regard to the nature of the transaction and in the absence of any other suggestion we must find that the consent given by the widow was free and valid.

The learned Counsel for the appellant however contends that inasmuch as Sinnia Chetti's legal position was either that of a constructive trustee or of a trustee *de son tort* it was incumbent upon him to invest the minor's money only in one of the securities authorised by S. 20 of the Indian Trust Act and the factum of the widow's consent to the purchase of land in dispute was wholly immaterial. The question to decide is if this is so.

Before examining this contention it might be more convenient to dispose of an objection raised by Mr. Patanjali Sastri towards the end of his arguments. He urged that as the present suit had been filed by the widow as a next friend of her minor son in spite of her consent it was not open to him to attack the purchase of the land and the suit is therefore liable to be dismissed or at all events stayed until the minor who is said to be of 16 years of age, attains majority. No objection appears to have been taken in the Courts below that the widow was not fully competent to represent her minor son and in the absence of any such objection, it seems to be impossible to give effect to this contention. The legal effect of plaintiff's mother's consent

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given at the time of the purchase of the land in dispute has got to be decided and it is not permissible in our opinion to allow the minor to be prejudiced by the fact that she has brought the suit as a next friend on his behalf. It is the minor who is the plaintiff in the suit and not his next friend although on account of his disability, he is authorised by law to institute the suit through a next friend. It is the minor's rights after all and not those of his next friend which have to be adjudicated in this case. This objection has therefore no force in our opinion and must be disregarded.

This brings us to the consideration of the main question involved in this appeal. It cannot be disputed—indeed it was admitted by the learned Counsel for the appellant that the mother was a *de jure* guardian of her minor son. What then was the real position in which Sinnia Chetti stood in relation to the minor? It was conceded in the written statement that Sinnia Chetti was liable to account for the period during which he was in possession of the estate left by his brother. This would to a great extent, as pointed out by Mr. Venkatachari, go to show that the capacity in which Sinnia Chetty was acting was more or less of a guardian and hence as declared in S. 20 of the Guardian and Wards Act of 1890 fiduciary. But is that enough to bring him under the stringent provisions of S. 20 of the Indian Trust Act? Is it impossible for a guardian to purchase immovable property for his ward? Learned Counsel for the appellant relied on an order passed by Mr. Justice Scott in *Cassumali Javerbhai Pirbhai*, In re,[1] where that learned Judge refused to permit a guardian to invest monies belonging to a minor in the purchase of lands on the ground that the proposed investment was not one which a trustee was under the provisions of S. 20 of the Trust Act authorised to make. This may have been so and a Court may be justified in refusing, in the circumstances of a particular case, to sanction an investment in a security not authorised by the Trust Act; but could it not do so, if it were inclined to permit such an investment? The learned Judge had in deciding the case only observed that a Court should *ordinarily* be guided by the rules embodied in the Trust Act in sanctioning changes in the investment of the minor's property. The words in S. 27 of the Guardian and Wards Act (VIII of

1. (1906) I.L.R. 30 Bom. 591.

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1890) are general and a guardian is bound to deal with the property of his ward as carefully as a man of ordinary prudence would deal with it if it were his own and may subject to the provisions of Ch. III of the Act do all acts which are reasonable and proper not only for the realisation and protection but also for the *benefit* of the property of which he is a guardian. Trevelyan in his well-known work on minors expresses his opinion at page 170 (5th Edition) that a guardian was entitled to invest money belonging to his ward in the purchase of immovable or other property. A reference to S. 50 of the Guardian and Wards Act may not be out of place. Under that section, the High Courts have been empowered to make rules which are consistent with the Act and sub-clause (*h*) of that section provides that they may do so as to the securities on which money belonging to wards may be invested. If the Courts were not authorised to permit the investment of minor's monies in any securities other than those authorised by S. 20 of the Indian Trust Act, the legislature, we take it, could say so without any difficulty and the power conferred on the High Courts to frame rules would have been meaningless and in any case unnecessary. A perusal of the definition of "guardian" in S. 4 of the Act would show that the provisions of the Act are not confined to guardians who have been appointed or declared to be such by a Court but that a person who is not appointed or declared to be a guardian would also be governed by its provisions. It is interesting to observe that the language employed by the legislature in S. 27 of the Guardian and Wards Act and in Ss. 15 and 36 of the Indian Trusts Act is almost identical. The conclusion seems to be therefore irresistible that a guardian although he occupies a position which is fiduciary in character cannot be held to be debarred from acquiring immovable property on behalf of his ward. The only standard by which he has to be judged is that of a prudent man who is acting carefully with his own money. If a guardian is found to have acted according to this standard he must be held to have done all that was required of him.

We are thus of opinion that if the minor's mother had acquired this property which fetched 5½ per cent. at the time when this was purchased, her act could not be characterised as that of an imprudent person acting carelessly.

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It was however argued by the learned Counsel for the appellant that Sinnia Chetti in having obtained possession of the property belonging to the minor must be held not only to fall within the ambit of S. 94 of the Indian Trust Act but should also be held to come under the provisions of S. 95 of the Act and would thus be obliged to invest the monies belonging to the minor in the securities sanctioned by S. 20 of the Act. It may be that a guardian would fall within the scope of S. 94 of the Indian Trust Act but he could not be held in every case to come within the purview of S. 95 of the Act. The argument overlooks the important words "so far as may be" which occur in that section. If a guardian, as found above, is held entitled to purchase immovable property under S. 27 of the Guardian and Wards Act, shall we be justified in construing S. 95 of the Trust Act in such a manner as to make the provisions contained in the Guardian and Wards Act to be inoperative and useless. It is only to provide for such cases in our opinion that the words "so far as may be" have been used in S. 95 of the Trust Act. In this view, the cases such as *Tirupatirayudu Naidu v. Lakshminarasammal*[1], *Vrandavan v. Parshottam*[2] and *Peer Mohideen Rowther v. Aisa Bivi*[3] have no application and need not be considered in any detail.

We are therefore of opinion that even if Sinnia Chetti were held to be a *de facto* guardian of the minor plaintiff appellant, he would be justified in purchasing the property for his, that is, the minor's benefit.

This is however not all. The facts which have been stated above go to show that Sinnia Chetti was not acting as a guardian on behalf of the minor but was functioning as an agent on behalf of the minor's mother and *de jure* guardian, and that his accounts were being regularly scrutinised by the minor's legal guardian with the assistance of her father. If this is the correct legal position in which Sinnia Chetti was placed, his only duty would be to act according to her instructions or with her consent. Since it has been found that the land in suit was purchased by him with his principal's consent, he cannot be blamed and at all events not held to be liable for his action in acquiring the property. The legal guardian's

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1. (1912) 23 M.L.J. 599: I.L.R. 38 Mad. 71.
2. (1926) 28 Bom.L.R. 1481.
3. (1934) 67 M.L.J. 563.

consent would, therefore, be a complete reply to any action taken by the minor against him.

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The appeal must for the above reasons fail and is dismissed with costs.

S.V.V. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

D. A. Kalandar Rowther and others .. *Appellants** (*L. Rs. of 4th Defendant*)

v.

Sivapunyam Chettiar and others .. *Respondents* (*Plaintiff and Defendants 1 to 3*).

Kalandar Rowther v. Sivapunyam Chettiar.

Hindu Law—Mitakshara—Joint family—New business started by father—Sons liquidating business and starting similar business later—Mortgage debt incurred for—If binding on minor brother.

A Hindu father started a rice-milling business which was different from the customary trade carried on by the family. This business stopped during his lifetime and for a year before his death in 1916 the mill was not worked. After his death the two major sons kept the rice mill idle. In 1922 the rice mill was sold and the bulk of the proceeds was utilised for discharging the family debts. In 1927 the two major sons, with their minor brother, represented by one of them as guardian, borrowed money on mortgage for purchasing a new rice mill.

Held, that the mortgage is not binding on the minor brother's interest in the joint family property. In the circumstances it is difficult to hold that the new rice mill is a continuation of a pre-existing ancestral family trade or that by operation of law the minor son incurred liabilities in this new business at the discretion of the manager in raising money for purposes which he thought to be necessary for starting this new trade.

Case-law discussed.

Second appeal against the decree of the Court of the Subordinate Judge of Kumbakonam in A. S. No. 62 of 1933 preferred against the decree of the Court of the District Munsif of Mannargudi in O. S. No. 112 of 1932.

R. Rajagopala Aiyangar for Appellants.

R. Kuppuswami Aiyar for Respondents.

The Court delivered the following

JUDGMENT.—The appellants in this case are the legal representatives of a mortgagee from the first and second defendants and from the first defendant as guardian of his minor brother,

* S. A. No. 174 of 1935. 19th January, 1939.

Kalandar Rowther v. Siva-punyam Chettiar.

the plaintiff, who attacks the mortgage as not binding on his interest in the joint family property. The family of the plaintiff followed the ancestral occupation of dealing in oil seeds and working country oil mills. The father Dharmalingam started a rice mill and ran it for some little time but for about a year before his death in 1916 the rice mill was not worked. After his death the two major sons, first and second defendants kept the rice mill idle. That at best is the finding of the Courts below. It is however contended that this finding ignores the evidence to the effect that the rice mill was worked for a short time after the death of the father; but it seems to me that I cannot go behind the findings of the Courts below on a question of fact. In 1922 this rice mill which had been lying idle for years was sold and the bulk of the sale proceeds appears to have been utilised for discharging family debts. Five years later in 1927, the first and second defendants decided to purchase a new rice mill and they borrowed money for that purpose, which borrowings have led up to the mortgage transaction now impugned by the minor brother, plaintiff. The question is whether the plaintiff is bound by the mortgage, the main basis of which was borrowings connected with the purchase and equipment of the new rice mill. The law on the subject is in my opinion fairly well settled, whatever may have been the difference of opinion in the past. The Privy Council in *Sanyasi Charan Mandal* v. *Krishnadhan Banerji*[1], had to deal with the case of a family which had two ancestral businesses in rice. The adult members of the family started a third business in rice which was held to be not ancestral or an extension of the ancestral business. The Judicial Committee held that the adult brothers were not entitled to bind the interest of their minor brother by borrowing for the purpose of this new business. Their Lordships point out that:

> "The distinction between an ancestral business and one started like the present after the death of the ancestor as a source of partnership relations is patent. In the one case these relations result by operation of law from succession on the death of an ancestor to an established business with its benefits and its obligations. In the other they rest ultimately on contractual arrangement between the parties."

Their Lordships go on to point out the inability of a *karta* to impose on a minor coparcener the risks and liabilities of a new business started by himself. This was a case under the

1. (1922) 43 M.L.J. 41: L.R. 49 I.A. 108: I.L.R. 49 Cal. 560 (P.C.).

Kalandar Rowther v. Sivapunyam Chettiar.

Dayabhaga but the applicability of the principle to families under the Mitakshara system has been established in the decision of the Privy Council in *Benares Bank, Ltd.* v. *Hari Narain*[1], where the Judicial Committee point out that even a father as manager of a joint family cannot impose upon his minor sons the risk of a new and speculative business. This decision affects the decision of this Court in *Venkatasami Naiker* v. *Palaniappa Chettiar*[2], where it was held that a Hindu father governed by the Mitakshara law can start a new trade with the aid of family funds and make that a family business binding on his sons who would be bound by an alienation made by the father for raising funds for carrying on that business. The decision in *Venkatasami Naiker* v. *Palaniappa Chettiar*[2], rests largely on an earlier decision in *Official Assignee of Madras* v. *Palaniappa Chetty*[3]. Now it has been held in at least two recent decisions, *Krishnaswami Aiyar* v. *Ramanadhan*[4] and *Nataraja Aiyar* v. *Lakshman Aiyar*[5], that the decision in *Venkatasami Naiker* v. *Palaniappa Chettiar*[2], is no longer good law after the Privy Council decision in *Benares Bank, Ltd.* v. *Hari Narain*[1]. It is of some importance in the present case because the appellants rely very largely on the decision in *Damodaram Chetty* v. *Bansilal Abeerchand*[6], which does not appear to have been expressly dissented from but in which the learned Judges quote with approval the decision in *Official Assignee of Madras* v. *Palaniappa Chetty*[3], followed in *Venkatasami Naiker* v. *Palaniappa Chettiar*[2]. The decision in *Damodaram Chetty* v. *Bansilal Abeerchand*[6], related to a case in which the family had an ancestral trade in piece goods carried on by the grandfather for a time and then closed down and revived by the father who pledged the credit of his sons, including a minor. The learned Judges hold in the circumstances of that case that the break in the continuity of the business would not prevent it from being a family business. They observe that:

> "Trade and commerce are largely dependent upon time, place and conditions and it seems to us monstrous to require that a person should be under an obligation to continue his business under any conditions whatsoever, and even though loss may be anticipated or certain, under the penalty of the

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1. (1932) 63 M.L.J. 92: L.R. 59 I.A. 300: I.L.R. 54 All. 564 (P.C.).
2. (1928) 56 M.L.J. 380: I.L.R. 52 Mad. 227.
3. (1918) 35 M.L.J. 473: I.L.R. 41 Mad. 824.
4. (1934) 68 M.L.J. 251.
5. (1936) M.W.N. 871.
6. (1926) 55 M.L.J. 471: I.L.R. 51 Mad. 711.

Kalandar Rowther v. Sivapunyam Chettiar.

business carried on by him ceasing to be regarded as an ancestral or family business."

They also observe that too narrow a construction should not be allowed to be placed on such expressions as family trade or business and that it is absurd to suppose that if a family business should be found to have consisted in the purchase and sale of one commodity, the purchase and sale of another commodity should be held to be outside the scope of the family business; and that the question whether the business was or was not a family business was to be determined in each case with regard to the recognised business, profession, means of livelihood or what is called the *kulachara* of the family in order to decide whether the particular enterprise or embarking was only within the reasonable limits of the exercise thereof or really, having regard to its nature or extent, a new speculative enterprise. After these observations the learned Judges quote with approval the pronouncement in *Official Assignee of Madras* v. *Palaniappa Chetty*[1], regarding the right of a Hindu father to begin a business as a joint family business binding himself and his minor sons. To the extent to which this decision relies upon *Official Assignee of Madras* v. *Palaniappa Chetty*[1], it must, I think, be held to be of doubtful validity in view of the decisions already referred to declaring that *Venkatasami Naiker* v. *Palaniappa Chettiar*[2] (which follows *Official Assignee of Madras* v. *Palaniappa Chetty*[1]), is no longer good law. But I see no reason to doubt the correctness of the general proposition laid down in *Damodaram Chetty* v. *Bansilal Abeerchand*[3], regarding the continuity of a business which is stopped for a short period and has been re-started on the lines of the ancestral trade of the family the stoppage being merely incidental to commercial necessities. I am of opinion, that, when there is an existing business carried on by the father, after his death that business in the hands of his sons will be an ancestral business in which the sons by operation of law acquire rights and liabilities. One of the incidents of the family relationship is the right of the manager to pledge the credit of the family including the minor coparceners for purposes necessary to the continuance of the business which itself is one of the sources

1. (1918) 35 M.L.J. 473: I.L.R. 41 Mad. 824.
2. (1928) 56 M.L.J. 380: I.L.R. 52 Mad. 227.
3. (1926) 55 M.L.J. 471: I.L.R. 51 Mad. 711.

of the family income. If the business for reasons purely incidental to ordinary commercial practice should cease to function for a short period and then be revived in such circumstances as would justify the inference that there was continuity between the old business and the revived business, then I see no reason why the revived business should not be treated as an ancestral business, carrying with it the incidental rights and obligations of an ancestral trade. The question whether a break of continuity does or does not bestow upon the revived business the character of a new enterprise started by the adult members in their individual capacity, is substantially a question of fact.

In the present case, so far as the facts are established, it would appear that the father started a rice-milling business which was different from the customary trade carried on by the family. That fact, however, does not to my mind decide the question of the nature of the trade in the hands of the sons. If the rice-milling business had been continued by the father up to his death and on his death had been carried on by the sons as part of the joint family estate yielding the joint family income, it would, to my mind, quite clearly have been ancestral property in the hands of the sons and would have carried with it the incidents of an ancestral family trade and there would have been no question as to the power of the manager to borrow money for the necessary purposes of that trade. But the fact is that this business started by the father stopped in his lifetime. Its assets were not liquidated until after his death, but there was apparently a complete termination of the business by the sale of all the plant followed by an interval of five years in which no rice-milling business of any kind was done by the family. Then there was the purchase of a new rice mill largely financed by borrowed money. In such circumstances it seems to me difficult to hold that the new rice mill was a continuation of a pre-existing ancestral family trade or that by operation of law the minor son acquired liabilities in this new business according to the discretion of the manager in raising money for purposes which he thought to be necessary for starting this new trade. In this view I must agree with the decision of the Courts below and dismiss the appeal with costs.

Leave refused.

S. V. V. —— *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Patna.]

PRESENT:—LORD ATKIN, LORD THANKERTON, LORD WRIGHT, LORD PORTER AND SIR GEORGE RANKIN.

Pakala Narayana Swami .. *Appellant**

v.

The King-Emperor .. *Respondent.*

P.C. — Narayana Swami v. King-Emperor.

Evidence Act (I of 1872), S. 32 (1)—Statement by person subsequently murdered—When admissible—"Circumstances of the transaction"—Meaning—Criminal Procedure Code (V of 1898), S. 162 (1)—Statement by person ultimately accused —Admissibility —Confession —What constitutes—Interpretation of statutes—Plain language.

The words of S. 32 (1) of the Evidence Act do not mean that the statement must be made after the transaction has taken place, or that the person making it must be near death, or that the "circumstances" can only include the acts done when and where the death was caused. The statement may be made before the cause of death has arisen, or before the deceased has any reason to anticipate being killed. The circumstances must be circumstances of the transaction, and general expressions indicating fear or suspicion whether of a particular individual or otherwise, and not directly related to the occasion of death, will not be admissible. Statements by the deceased that he was proceeding to the spot where he was in fact killed, or as to his reasons for so proceeding, or that he was going to meet a particular person, or that he had been invited by such a person to meet him, would each of them be circumstances of the transaction, and would be so whether the person was unknown or was not the person accused. Such a statement might indeed be exculpatory of the person accused. The phrase "circumstances of the transaction" is not as broad as "circumstantial evidence" which includes evidence of all relevant facts, but it is narrower than *'res gestae.'* The circumstances must have some proximate relation to the actual occurrence. The circumstances, again, should be of the transaction which resulted in the death of the declarant. It is not necessary that there should be a known transaction other than that the death of the declarant has ultimately been caused, for the condition of the admissibility of the evidence is that "the cause of the declarant's death comes into question."

The statements made inadmissible by S. 162 (1), Criminal Procedure Code, include a statement made by a person who is ultimately accused.

Asimuddy v. *Emperor*, (1926) I.L.R. 54 Cal. 237, overruled.

Opinion of Reilly, J., in *King-Emperor* v. *Syamo*, (1932) 62 M.L.J. 742: I.L.R. 55 Mad. 903 (F.B.), approved.

No statement that contains self-exculpatory matter can amount to a confession, if the exculpatory statement is of some fact which if true would negative the offence alleged to be confessed. And a confession must either admit in terms of the offence or at any rate substantially all the facts which constitute the offence. An admission of a gravely incriminating fact, even a conclusively incriminating fact is not itself a confession.

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* P. C. Appeal No. 81 of 1938. ... — 20th January, 1939.
Patna Appeal No. 19 of 1938.

P.C.
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When the meaning of the words of an enactment is plain, it is not the duty of the Courts to busy themselves with supposed intentions of the legislature.

Grey v. *Pearson*, (1857) 6 H.L.C. 61: 10 E.R. 1216 and *Commissioners for Special Purposes of Income-tax* v. *Pemsel*, (1891) A.C. 531, referred to.

Appeal from a decision of the High Court, Patna (Terrell, C. J. and Manohar Lall, JJ.) dated 9th November, 1937, dismissing the appeal from conviction of murder and sentence of death passed on the appellant on 15th September, 1937, by the Sessions Judge, Berhampur.

D. N. Pritt, K.C. and *H. W Williams* for Appellant.—The decisions in India reveal a sharp cleavage of opinion on the question whether statements are admissible in evidence which have been made by an accused person to a Police Officer during his investigation and recorded under S. 162 of the Code of Criminal Procedure. The contrasting views are illustrated in *Azimuddy* v. *Emperor*[1] and *King-Emperor* v. *Syamo*[2]. It is submitted that the latter decision represents the correct view, and that the prohibition in S. 162 applies also to statements by a person ultimately accused of the offence under investigation. Counsel referred to *Jogendranath Gorai* v. *King-Emperor*[3], then further called the attention of the Board to an agreed list of cases on the subject. A statement of an incriminating nature by the accused to a Police Officer will also be ruled out as a "confession" under S. 25 of the Indian Evidence Act. Any statement is a confession which proves one of the facts in the prosecution's case, or which may fairly be construed as a statement by the accused that he committed the offence. It is submitted that this case falls within *Queen-Empress* v. *Pandharinath*[4], confirmed in *Queen-Empress* v. *Nana*[5]. But *King-Emperor* v. *Kangal Mali*[6], is an authority the other way. The statement by the deceased that he was going to the house of the accused cannot be said to be one as to a circumstance of the transaction which resulted in the death. The term "transaction" comprises only the activities which actually resulted in death. Counsel referred to *Rego* v. *King-Emperor*[7].

G. D. Roberts, K.C., *W. Wallach* and *Megaw* for the Crown.—The words "any person" in S. 162 of the Criminal Procedure Code were not intended to include an accused person. Support for that view may be found on examination of the Code of Criminal

1. (1926) I.L.R. 54 Cal. 237.
2. (1932) 62 M.L.J. 742: I.L.R. 55 Mad. 903. (F.B.).
3. (1935) I.L.R. 63 Cal. 419.
4. (1881) I.L.R. 6 Bom. 34.
5. (1889) I.L.R. 14 Bom. 260 (F.B.).
6. (1905) I.L.R. 41 Cal. 601.
7. (1933) 29 Nag. L.R. 251 at 259.

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Procedure, Act XXV of 1861, S. 145 of which is now S. 162 of the present Code, and S. 148 of which is now S. 25 of the Evidence Act. Under the earlier Code statements to the police during an investigation were barred as evidence by S. 145. If the statements thus protected included statements by accused persons, there would have been no object in having S. 148, or, now, S. 25 of the Evidence Act, 1925. In *King-Emperor* v. *Syamo*[1], the statement was made by a person before he was arrested. In the present case there is no evidence when the appellant made the statement. Counsel referred to *King-Emperor* v. *Maung Tha Din*[2]. In S. 540 of the Code "any person" is used in a sense clearly excluding the accused person. The statement in question, it is further submitted, is not a confession within the meaning of S. 25 of the Evidence Act, although it may be an admission within the definition in S. 17. Counsel referred to *King-Emperor* v. *Haji Sher Mahomed*[3].

Pritt, K.C., replied.

The following cases, other than those already cited above, were included in the agreed list of authorities submitted to the Board by Counsel: In re *Sheik Kalesha*[4], *King-Emperor* v. *Issuf Mohamed*[5], *King-Emperor* v. *Faujdar*[6], *Rannun* v. *The Crown*[7], *Jagwa Dhanuk* v. *King-Emperor*[8], *Queen-Empress* v. *Jadab Das*[9], *Ameen Sharif* v. *King-Emperor*[10], *Queen-Empress* v. *Javecharan*[11], *King-Emperor* v. *Balmakund*[12], *King-Emperor* v. *Harman Kisha*[13], *King-Emperor* v. *Ramanujam*[14], *King-Emperor* v. *Kangal Mali*[15], *Barindra Kumar Ghose* v. *King-Emperor*[16] and *Legal Remembrancer* v. *Lalit Mohan Singh Roy*[17].

20th January, 1939. Their Lordships' judgment was delivered by

Lord Atkin.

LORD ATKIN.—This is an appeal by special leave from a judgment of the High Court of Patna which affirmed the decision of the Sessions Judge at Berhampur who had convicted the appellant of the murder of one Kurree Nukaraju and sentenced him to death. The accused, his wife, his wife's brother and his

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1. (1932) 62 M.L.J. 742: I.L.R. 55 Mad. 903 (F.B.).
2. (1926) I.L.R. 4 Rang. 72 (F.B.).
3. (1921) I.L.R. 46 Bom. 961.
4. (1931) 62 M.L.J. 71.
5. (1930) I.L.R. 55 Bom. 435.
6. (1933) I.L.R. 55 All. 463.
7. (1926) I.L.R. 7 Lah. 84.
8. (1925) I.L.R. 5 Pat. 63.
9. (1899) I.L.R. 27 Cal. 295.
10. (1934) I.L.R. 61 Cal. 607 (F.B.).
11. (1894) I.L.R. 19 Bom. 363.
12. (1930) I.L.R. 52 All. 1011 (F.B.).
13. (1934) I.L.R. 59 Bom. 120.
14. (1934) 68 M.L.J. Supp. 73: I.L.R. 58 Mad. 642 (F.B.).
15. (1905) I.L.R. 41 Cal. 601.
16. (1909) I.L.R. 37 Cal. 467.
17. (1921) I.L.R. 49 Cal. 167.

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clerk living at his house were charged with the murder before the Sub-divisional Magistrate, Chatrapur, in May and June, 1937. After hearing the evidence the examining magistrate discharged all the accused, holding that there was no sufficient evidence to support the charge. Thereupon the Sessions Judge, Berhampur, exercising his powers under the Code of Criminal Procedure, called upon the accused to show cause why they should not be committed for trial and in July, 1937, ordered the present accused and his wife to be committed to the Court of Sessions to stand their trial for offences under sections of the Indian Penal Code, 120-B (conspiring to murder), 302 (murder) and 201 (causing evidence of an offence to disappear). At the trial the Sessions Judge acquitted the appellant's wife of all the charges but convicted the appellant of murder and sentenced him to death. The appeal is based upon the admission of certain evidence said to be made inadmissible by provisions of the Code of Criminal Procedure and the Evidence Act; and is further maintained upon the contention that whether the disputed evidence be admitted or not and certainly if it ought to have been rejected there is no evidence sufficient to support this conviction.

On Tuesday, 23rd March, 1937, at about noon the body of the deceased man was found in a steel trunk in a third class compartment at Puri, the terminus of a branch line on the Bengal Nagpur Railway, where the trunk had been left unclaimed. The body had been cut into seven portions, and the medical evidence left no doubt that the man had been murdered. A few days elapsed before identification, but eventually the body of the deceased was identified by his widow. He was a man of about 40 and had been married about 22 years. He had been a peon in the service of the Dewan of Pithapur one of whose daughters was the wife of the accused. It was suggested by the prosecution that before her marriage and about 19 years before the events in question the wife of the accused, then a girl of about 13, had had an intrigue with the deceased. Four letters were produced by the deceased's widow purporting to be signed by the girl bearing date 1918 supporting this suggestion. The Judge was not satisfied with the evidence of handwriting; there was no other evidence worth considering in support; and this suggested motive must be definitely rejected. The fact however remains that the deceased was in possession of these four documents purporting to be signed by the wife of the accused. About 1919

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the accused and his wife were married. They went to live at Berhampur about 250 miles from Pithapur. About 1933 they returned to Pithapur where they appear to have stayed with her father. They seem at that time to have been in need of money; and during 1936 the accused's wife borrowed from the deceased man at various times and in relatively small sums an amount of 3,000 Rupees at interest at the rate of 18 per cent. per annum. About 50 letters and notes proving these transactions signed by the accused's wife were found in the deceased man's house at Pithapur after his death. On Saturday, 20th March, 1937, the deceased man received a letter the contents of which were not accurately proved, but it was reasonably clear that it invited him to come that day or next day to Berhampur. It was unsigned. The widow said that on that day her husband showed her a letter and said that he was going to Berhampur as the appellant's wife had written to him and told him to go and receive payment of his due. This evidence was objected to; it was admitted as falling under the provisions of S. 32 (1) of the Indian Evidence Act. The admission of this evidence is one of the grounds of the appeal, and will be discussed later. The deceased left his house on Sunday, 21st March, in time to catch the train for Berhampur. On Tuesday, 23rd March, his body was found in the train at Puri as already stated.

Police suspicion does not appear to have been directed against the accused and his household until 4th April, on which date the police visited the house, examined the inhabitants and obtained a statement from the accused the admissibility of which is one of the principal grounds of the appeal. They searched the premises, as is said, for incriminating documents only, and in the afternoon arrested the four persons already mentioned. In addition to evidence of the facts above stated the prosecution adduced the evidence of two employees in a shop at Berhampur where trunks were made and sold, who gave evidence that on Monday, March 22nd, in the afternoon the dhobie or washerman of the accused called at the shop and ordered a trunk; and that a trunk was taken to the accused's house and shown to him and his wife. It was rejected as being too large, and a smaller one of the size of the trunk in question was then delivered to the dhobie at the shop and he took it away. The transaction was entered in the rough day book and in the fair copy book of the shop as of the day

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in question; and though the trial judge thought that the entry had been tampered with so as to insert the height of the trunk the trial judge and the High Court, both of whom inspected the entries, were satisfied that they genuinely established the sale of such a trunk on that day. The witnesses identified the trunk in which the body was found as being the trunk of their manufacture which was sold in the circumstances stated on the Monday afternoon. The dhobie was called and proved the purchase of a trunk after the rejection by the accused of the first one brought from the shop. He, however, placed the date as being on a Saturday. The judge thought his evidence unreliable and said that he ignored it. He, however, found the sale of the particular trunk was proved to have taken place as stated by the witnesses on Monday, March 22nd. The prosecution then sought to prove that the accused took the trunk to the train in which it was found on Tuesday, March 23rd. Evidence was given by a jetka driver who lived near the accused that early in the morning some four months before the trial the accused had come to his house and said he wanted a jetka; that he drove to the accused's house; that a trunk which was like the trunk in question was loaded on the jetka; and that he drove the accused with the trunk to the station where the trunk was unloaded and taken into the station. The evidence was corroborated by a man who ran alongside the jetka in charge of the horse which was fresh. The defence relied strongly on statements made by both these witnesses in cross-examination that they remembered that the occasion was a Saturday as it was a shandy (fair) day at Berhampur. Both courts accepted the evidence as relating to the carriage of this trunk on the 23rd. They thought that the difference as to date was an inaccuracy due to a *bona fide* mistake. A witness of repute spoke to seeing the accused at the station on the morning of March 23rd, when the train on which the trunk was found arrived. He could not say that he saw the accused enter the train. When the accused was examined by the police at his house on April 4th, it is alleged that he made the statement which the defence sought to have rejected and which must be further discussed. The alleged statement was that the deceased had come to his house on the evening of March 21st, slept in one of the outhouse rooms for the night and left on the evening of the 22nd by the passenger train; that on the morning of March 23rd the accused

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went to the station with Gangulu (the jetka driver) in his jetka, and went off by the passenger train to Chatrapur on some private business with one Delhi Chiranjivirao. Hearing at the Chatrapur station that this man was away, he returned by the Vizagapatam passenger train as far as Jagannadhpur whence he went to Narendrapur to see one Juria Naiko. He too was absent, so the accused returned to Berhampur by jetka. This statement was obviously important for it admitted that the murdered man arrived at the accused's house on the 21st. Both courts admitted it. Their Lordships are of opinion that it should have been rejected for reasons that will be given later. The accused and the other three members of his household were arrested on the 4th, and the house remained unoccupied. On the 7th a further search of the premises was made by the police, and a bundle of rags which apparently had been washed but contained bloodstains was found buried at a depth of about 18 inches in the compound. Some rags also bloodstained but still damp were found in a box in the bathroom. The trial judge accepted this evidence; on appeal both of the judges thought that the articles found were not on the premises when the police searched on the 4th; Mr. Justice Manohar Lall thought that the discovery was made under highly suspicious circumstances and that no inference should be drawn against the accused in respect of it. In this state of the case their Lordships think that it would be unsafe to rely upon the discoveries on April 7th. Before the examining magistrate the accused's statement was that he was not guilty. He had come to Berhampur on March 17th in connection with a law suit of which he gave some particulars. He neither purchased the trunk through the washerman nor did he take it to any place in any jetka. The deceased never came to his house at any time in March last. He did not know the deceased. At the trial he said that the statement he had made in the lower court was correct. When asked by the judge whether he could suggest any reason why so many witnesses should come and give evidence against him, he said "The witnesses are mistaken and the police are suffering from excessive zeal".

The first question with which their Lordships propose to deal is whether the statement of the widow, that on 20th March the deceased had told her that he was going to Berhampur as the accused's wife had written and told him to go and receive

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payment of his dues, was admissible under S. 32 (1) of the Indian Evidence Act, 1872. That section provides:

> "Statements written or verbal of relevant facts made by a person who is dead. . . . are themselves relevant facts in the following cases (1) when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.
>
> Such statements are relevant whether the person who made them was or was not at the time when they were made under expectation of death and whatever may be the nature of the proceeding in which the cause of his death comes into question."

A variety of questions has been mooted in the Indian courts as to the effect of this section. It has been suggested that the statement must be made after the transaction has taken place, that the person making it must be at any rate near death, and that the "circumstances" can only include the acts done when and where the death was caused. Their Lordships are of opinion that the natural meaning of the words used does not convey any of these limitations. The statement may be made before the cause of death has arisen, or before the deceased has any reason to anticipate being killed. The circumstances must be circumstances of the transaction: general expressions indicating fear or suspicion whether of a particular individual or otherwise and not directly related to the occasion of the death will not be admissible. But statements made by the deceased that he was proceeding to the spot where he was in fact killed, or as to his reasons for so proceeding, or that he was going to meet a particular person, or that he had been invited by such person to meet him would each of them be circumstances of the transaction, and would be so whether the person was unknown, or was not the person accused. Such a statement might indeed be exculpatory of the person accused. "Circumstances of the transaction" is a phrase, no doubt, that conveys some limitations. It is not as broad as the analogous use in "circumstantial evidence" which includes evidence of all relevant facts. It is on the other hand narrower than *"res gestae"*. Circumstances must have some proximate relation to the actual occurrence: though as for instance in a case of prolonged poisoning they may be related to dates at a considerable distance from the date of the actual fatal dose.

It will be observed that "the circumstances" are of the transaction which resulted in the death of the declarant. It is

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not necessary that there should be a known transaction other than that the death of the declarant has ultimately been caused, for the condition of the admissibility of the evidence is that "the cause of [the declarant's] death comes into question". In the present case the cause of the deceased's death comes into question. The transaction is one in which the deceased was murdered on 21st March, or 22nd March, and his body was found in a trunk proved to be bought on behalf of the accused. The statement made by the deceased on 20th or 21st March that he was setting out to the place where the accused lived, and to meet a person, the wife of the accused, who lived in the accused's house, appears clearly to be a statement as to some of the circumstances of the transaction which resulted in his death. The statement was rightly admitted.

It is now necessary to discuss the question whether the alleged statement of the accused to the police before arrest was protected by S, 162 of the Code of Criminal Procedure which provides (sub-S. 1) :—

"No statement made by any person to a police officer in the course of an investigation under this Chapter shall if reduced into writing be signed by the person making it: nor shall any such statemnnt or any record thereof whether in a police diary or otherwise or any part of such statement or record be used for any purpose (save as hereinafter provided) at any inquiry or trial in respect of any offence under investigation at the time when such trial was made."

This section which in its amended form was substituted for the original section by S. 34 of the Code of Criminal Procedure Amendment Act, 1923, has been the subject of repeated decisions in the High Courts of India and has given rise to a distinct cleavage of opinion. The majority of the High Courts have held that it has no application to a statement made by a person who at the time it is tendered in evidence is an accused person; the minority have held that there is no such limitation. Their Lordships have been referred to at least twelve reported cases, all of which with others they have considered. The representative opinions on either side may be taken to be *Azimuddy* v. *Emperor*[1] in a judgment of the then Rankin, J., admitting such a statement against the accused and *The King-Emperor* v. *Syamo*[2] in a judgment of Reilly, J., sitting in a full Bench of the High Court of Madras rejecting the statement.

1. (1926) I.L.R. 54 Cal. 237.
2. (1932) 62 M.L.J. 742: I.L.R. 55 Mad. 903 (F.B.).

The present Board have had the advantage of the presence of Sir George Rankin in giving a full consideration to all the reported decisions, and they are of opinion that the words of the section lead to the conclusion that the statement is not admissible even when made by the person ultimately accused.

The reference in the section to "this chapter" is to the group of sections beginning with Chapter XIV forming Part V of the code entitled "Information to the Police and their powers to investigate". After giving powers to certain police officers to investigate certain crimes, the code proceeds in S. 160 to give power to any police officer making an investigation by an order in writing to require the attendance before himself of persons who appear to be acquainted with the circumstances of the case. By S. 161 any policeman making an investigation under the chapter may examine orally any person supposed to be acquainted with the facts and circumstances of the case, and such person shall be bound to answer all questions put to him other than those the answers to which may tend to incriminate him. Then follows the section in question which is drawn in the same general way relating to "any person". That the words in their ordinary meaning would include any person though he may thereafter be accused seems plain. Investigation into crime often includes the examination of a number of persons none of whom or all of whom may be suspected at the time. The first words of the section prohibiting the statement if recorded from being signed must apply to all the statements made at the time and must therefore apply to a statement made by a person possibly not then even suspected but eventually accused. "Any such statement" must therefore include such a case; and it would appear that if the statement is to be admitted at all it can only be by limiting the words "used for any purpose" by the addition of such words as "except as evidence for or against the person making it when accused of an offence". If such an exception were intended one would expect to find it expressed; and their Lordships cannot find sufficient grounds for so departing from the plain words used. If one had to guess at the intention of the legislature in framing a section in the words used, one would suppose that they had in mind to encourage the free disclosure of information or to protect the person making the statement from a supposed unreliability of police testimony as to alleged statements or both. In any case the reasons would

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apply as might be thought *a fortiori* to an alleged statement made by a person ultimately accused. But in truth when the meaning of words is plain it is not the duty of the Courts to busy themselves with supposed intentions.

"I have been long and deeply impressed with the wisdom of the rule, now I believe universally adopted, at least in the Courts of Law in Westminster Hall, that in construing wills and indeed statutes, and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no farther."

(Lord Wensleydale in *Grey* v. *Pearson*[1].)

"My Lords, to quote from the language of Tindal, C.J., when delivering the opinion of the judges in the *Sussex Peerage Case*[2]—'The only rule for the construction of Acts of Parliament is that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do in such case best declare the intention of the lawgiver. But if any doubt arises from the terms employed by the legislature, it has always been held a safe means of collecting the intention, to call in aid the ground and cause of making the statute, and to have recourse to the preamble which according to Dyer, C.J. (*Stowel* v. *Lord Zouch*[3]) is a key to open the minds of the makers of the Act, and the mischiefs which they are intended to redress'."

(Lord Halsbury, L.C., in *Commissioners for Special Purposes of Income-tax* v. *Pemsel*[4].)

In this case the words themselves declare the intention of the legislature. It therefore appears inadmissible to consider the advantages or disadvantages of applying the plain meaning whether in the interests of the prosecution or the accused. It would appear that one of the difficulties that has been felt in some of the Courts in India in giving the words their natural construction has been the supposed effect on Ss. 25, 26 and 27 of the Indian Evidence Act, 1872. S. 25 provides that no confession made to a police officer shall be proved against an accused. S. 26.—No confession made by any person whilst he is in the custody of a police officer shall be proved as against such person. S. 27 is a proviso that when any fact is discovered in consequence of information received from a person accused of any offence whilst in the custody of a police

1. (1857) 6 H.L.C. 61 at 106: 10 E.R. 1216.
2. (1844) 11 Cl. & F 85 at 143: 8 E.R. 1034.
3. (1562) 1 Plowd. 353 at 369: 75 E.R. 536.
4. (1891) A.C. 531 at 542.

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officer so much of such information whether it amounts to a confession or not may be proved. It is said that to give S. 162 of the Code the construction contended for would be to repeal S. 27 of the Evidence Act for a statement giving rise to a discovery could not then be proved. It is obvious that the two sections can in some circumstances stand together. S. 162 is confined to statements made to a police officer in course of an investigation. S. 25 covers a confession made to a police officer before any investigation has begun or otherwise not in the course of an investigation. S. 27 seems to be intended to be a proviso to S. 26 which includes any statement made by a person whilst in custody of the police and appears to apply to such statements to whomsoever made, for example, to a fellow prisoner, a doctor or a visitor. Such statements are not covered by S. 162. Whether to give to S. 162 the plain meaning of the words is to leave the statement still inadmissible even though a discovery of fact is made such as is contemplated by S. 27 it does not seem necessary to decide. In the present case the declarant was not in the custody of the police, and no alleged discovery was made in consequence of his statement. The words of S. 162 are in their Lordships' view plainly wide enough to exclude any confession made to a police officer in course of investigation whether a discovery is made or not. They may therefore *pro tanto* repeal the provisions of the section which would otherwise apply. If they do not, presumably it would be on the ground that S. 27 of the Evidence Act is a "special law" within the meaning of S. 1 (2) of the Code of Criminal Procedure, and that S. 162 is not a specific provision to the contrary. Their Lordships express no opinion on this topic for whatever be the right view it is necessary to give to S. 162 the full meaning indicated. It only remains to add that any difficulties to which either the prosecution or the defence may be exposed by the construction now placed on S. 162 can in nearly every case be avoided by securing that statements and confessions are recorded under S. 164. In view of their Lordships' decision that the alleged statement was inadmissible by reason of S. 162, the appellants' contention that it was inadmissible as a confession under S. 25 of the Evidence Act becomes unnecessary. As the point was argued, however, and as there seems to have been some discussion in the Indian Courts on the matter it may be useful to state that in their Lordships' view no statement that contains self-exculpatory

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matter can amount to a confession, if the exculpatory statement is of some fact which if true would negative the offence alleged to be confessed. Moreover a confession must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence. An admission of a gravely incriminating fact, even a conclusively incriminating fact is not of itself a confession, for example, an admission that the accused is the owner of and was in recent possession of the knife or revolver which caused a death with no explanation of any other man's possession. Some confusion appears to have been caused by the definition of confession in Art. 22 of Stephen's "Digest of the Law of Evidence" which defines a confession as an admission made at any time by a person charged with a crime stating or suggesting the inference that he committed that crime. If the surrounding articles are examined it will be apparent that the learned author after dealing with admissions generally is applying himself to admissions in criminal cases, and for this purpose defines confessions so as to cover all such admissions, in order to have a general term for use in the three following articles, confession secured by inducement, made upon oath, made under a promise of secrecy. The definition is not contained in the Evidence Act, 1872: and in that Act it would not be consistent with the natural use of language to construe confession as a statement by an accused "suggesting the inference that he committed" the crime.

The statement of the accused has now been held to have been wrongly admitted. What effect should that have on the appeal? Mr. Pritt, for the appellant, forcibly argued that the trial judge relied on the statement as sufficient evidence in itself to show that the deceased man arrived at the accused's house on the night of 21st March; and that when that evidence failed there was not sufficient evidence to support a conviction for murder. Their Lordships cannot take that view. For this purpose they will be content to abide by the rule governing the Patna High Court expressed in S. 537 of the Code of Criminal Procedure:—

"No finding sentence or order passed by a court of competent jurisdiction shall be reversed . . . on appeal . . . . on account of any error in the judgment or other proceedings during trial . . . . unless such error has in fact occasioned a failure of justice."

They will for this case adopt this rule though it probably is wider than the rules which this Board has laid down for the exercise of their powers in dealing with criminal appeals. It

will be observed that the sole effect of the disputed statement was to supply the prosecution with evidence of the material fact that the deceased reached the accused's house at the critical time. But though this evidence be rejected there is other evidence of overwhelming strength to the same effect. It must be taken to have been proved that a trunk was bought by order of the accused and taken to his house on the afternoon of 22nd March. At about 6 A.M. on 23rd March that trunk containing the body of the deceased was placed on the train at the station of Berhampur having been conveyed there in a vehicle ordered by the accused in which he and the trunk travelled to the station. The deceased had on the day before set out from his house for the express purpose of visiting the accused's house.

In these circumstances there is ample evidence of the presence of the deceased at the accused's house; the fact which alone the statement sought to establish. Faced with this difficulty Mr. Pritt sought to establish that in no case whether the statement be rejected or admitted was there sufficient evidence of his client's guilt. The facts were consistent, he said, with the accused being merely an accessory after the fact to a murder to which he was no party. Their Lordships are unable to say that there was not ample evidence upon which the judge of fact could properly convict of murder. The accused man was found to have been in possession of a trunk in which was the mutilated body of a man recently murdered: a trunk which he purchased a little more than 12 hours before the trunk was placed in the train. He gave no explanation: and contented himself with a denial that he knew the man, or that the man had visited his house, or that he had seen the trunk. All these statements were untrue. In these circumstances it is impossible to say that the proceedings which ended with a conviction for murder resulted in a failure of justice. For these reasons the appeal should be dismissed and their Lordships will humbly advise His Majesty accordingly.

Solicitors for Appellant: *Hy. S.L. Polak & Co.*

Solicitors for Respondent: *The Solicitor, India Office.*

R.C.C. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Krishna Aiyar .. *Appellant* (3rd Defendant)*

v.

Subba Reddiar and others .. *Respondents (Plaintiff and Defendants 1, 2, 4 and 5).*

Krishna Aiyar v. Subba Reddiar.

Mortgage—Subrogation—Presumption—Presumption in favour of mortgagee discharging an earlier mortgage—Nature of—Claim on original mortgage barred—If such a mortgage can be set up as a shield—Original mortgage sued on and decreed—Acknowledgment of decree—If acknowledgment of decree, acknowledgment of mortgage.

When a puisne encumbrancer discharges an earlier mortgage he is presumed to act for his own benefit, the presumption being applied whether he does or does not know of the existence of an intermediate mortgage benefited by his act which might possibly threaten his own security. The presumption is not affected by the addition of other properties in the final charge nor by variations of interest, nor by the fact that the earlier mortgage was by two persons and the later mortgage was by one. It is not an irrebuttable presumption, but it is one which will be drawn unless there are in the evidence positive indications that no such intention could have been held.

If a suit on the original mortgage is time barred, the person who claims subrogation could not be allowed subrogation whether he relies on it as a plaintiff or as a defendant.

Where the original mortgage has resulted in a decree, an acknowledgment of the existence of the decree cannot be taken to be an acknowledgment of the subsistence of the debt which that decree extinguished so as to save limitation for the mortgage.

Appeal against the decree of the Court of the Subordinate Judge of Tuticorin in A. S. No. 84 of 1932 preferred against the decree of the Court of the District Munsif of Srivaikuntam in O. S. No. 492 of 1931.

V. K. Srinivasa Aiyangar and *P. J. Kuppanna Rao* for Appellant.

S. V. Venugopalachariar for Respondents.

The Court delivered the following

JUDGMENT.—This appeal arises out of a suit on a mortgage, the appellant being the third defendant who claimed priority by reason of his having discharged a decree on an earlier mortgage. The following are the essential facts:—On 26th December, 1917, the first defendant along with one Ramaswami mortgaged 10 items (of which each of the mortgagors owned five) to Janaki

* S. A. No. 287 of 1935. 26th January, 1939.

for Rs. 300 with interest at 11½ per cent. the deed of mortgage being Ex. I. On 9th September, 1919, the first defendant charged 4 of the 5 items to which he was entitled under a security bond Ex. A in favour of the second defendant in a sum of Rs. 400. This security bond was assigned to the plaintiff under Ex. B in 1927. On 31st August, 1924, the first defendant mortgaged the four items covered by the security bond, Ex. A and 14 other items not covered by either of the prior deeds to the third defendant for a sum of Rs. 800 with interest at 15 per cent. The deed, Ex. III, does not refer to the security bond Ex. A, but it recites that out of the consideration a sum of Rs. 550 is retained with the mortgagee to discharge the decree on the first mortgage, Ex. I. A sum of Rs. 100 was retained to pay off an usufructuary mortgage with which we are not now concerned and a sum of Rs. 150 was stated to have been paid on the day of the deed to the mortgagor in cash. Now the evidence is that the amount recited as having been paid in cash was not so paid; but that on 5th November, 1924, the third defendant paid a sum of Rs. 707 to discharge Ex. I, this payment being evidenced by Ex. II. The third defendant subsequently purchased the equity of redemption in the 4 items covered by Ex. A from the Official Receiver in the insolvency of the first defendant. The present suit on the basis of Ex. A filed by the Assignee plaintiff was launched on 6th October, 1931. The third defendant is interested in the hypotheca in three capacities. He is the purchaser of the equity of redemption from the Official Receiver. He has rights under his puisne mortgage Ex. III and he claimed priority by reason of his having discharged the earlier mortgage Ex. I.

Both the Courts below have held that the third defendant's right to subrogation does not exist because he cannot be held to have had any intention to keep the original mortgage Ex. I alive. They rely on three considerations in arriving at this conclusion, firstly, on the fact that he was ignorant of the existence of the intermediate charge, Ex. A, secondly on the facts that Ex. I was a joint mortgage binding other properties as well as those mortgaged by the succeeding documents and that Ex. III covered not only all the items bound by Ex. I but also 14 other items and carried a higher rate of interest. Thirdly, the consideration which weighed most with the Courts below was that at the time of Ex. III, the third defendant made no enquiries as to the amount due under the decree on the first mortgage. It has been held in

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Krishnamurthy Chettiar v. *Sathappa Chettiar*[1] and *Andi Thevan* v. *Nagayasami Chettiar*[2], that ignorance of the existence of an intermediate mortgage is no ground for refusing to draw in favour of the person who discharges the first encumbrance the presumption that he intended to act for his own benefit and keep alive the original mortgage as a shield against any danger which might threaten his puisne mortgage. As to the addition of other properties in the later mortgage and the substitution of a different rate of interest two cases have been cited *Velayuda Reddi* v. *Narasimha Reddi*[3] and *Gopal Chunder Sreemany* v. *Herembo Chunder Holdar*[4] as authority for the position that such variations do not affect the presumption which would be drawn in favour of the person who discharges the earlier encumbrance. I have not been referred to any case in which there was the added complication of the first mortgage being a mortgage by two persons covering properties other than those mortgaged to the person who claimed priority. But I cannot see that this factor should logically affect the position; for the right of subrogation arises out of the removal of a danger which threatened the hypotheca, which removal is to the benefit not only of the person who discharges the first mortgage, but also of any intermediate encumbrancer. The third defendant having discharged the decree which, though it was passed on a mortgage by two persons binding other properties than those in which the third defendant was interested, was in fact a danger to the hypotheca both under Ex. A and under Ex. III to the full amount of the decree, I see no reason why a person who discharges that decree should not get the benefit of the removal of the danger. The legal position seems to be clear. When a puisne encumbrancer discharges an earlier mortgage he is presumed to act for his own benefit, the presumption being applied whether he does or does not know of the existence of an intermediate mortgage benefited by his act which might possibly threaten his own security. The presumption is not affected by the addition of other properties in the final charge nor by variations in the rate of interest. It is not an irrebuttable presumption, but it is one which will be drawn unless there are in the evidence positive indications that no such intention could have been held. The only indication not covered by the authorities which I have

1. (1932) 64 M.L.J. 523: I.L.R. 56 Mad. 517.
2. (1927) 55 M.L.J. 369.
3. (1916) 32 M.L.J. 263.
4. (1889) I.L.R. 16 Cal. 523.

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quoted lies in the fact that at the time of Ex. III no enquiry appears to have been made regarding the amount of the mortgage Ex. I. I do not think that this affects the question. At the time of Ex. III the third defendant intended to pay a sum of Rs. 550 towards the discharge of the prior decree. In fact he paid a greater sum after he had found out the precise amount due. Surely he should be presumed to have the intention to act for his own benefit and to keep the earlier mortgage alive to the extent to which he had been required to pay money for its discharge. I therefore disagree with the lower Court as to the applicability of the presumption on the basis of which the third defendant would be entitled to subrogation.

There remains the question of limitation. The trial Court, relying on *Kotappa* v. *Raghavayya*[1], held that the right of subrogation could not be urged in defence at a time when the mortgage which had been discharged, was itself barred by limitation. The learned Subordinate Judge disapproves of this conclusion, but gives no reasons for doing so and quotes no authorities. There is a certain conflict in the authorities on this question. The Privy Council in *Mahomed Ibrahim Hossein Khan* v. *Ambika Pershad Singh*[2] held that when a right of subrogation is claimed by a *plaintiff* in a mortgage suit on a puisne mortgage, it could not be upheld when the prior mortgage which had been discharged was barred at the time of the suit. There is, so far as I am aware, no decision of the Privy Council to the effect that a *defendant* cannot claim priority on the basis of the time-barred mortgage suit, but there are conflicting decisions of this Court. *Velayuda Reddi* v. *Narasimha Reddi*[3] and *Venkataramana Reddi* v. *Rangiah Chetti*[4] are cases in which it was held that limitation did not affect the right to use the prior mortgage as a shield. Subsequent to these decisions, however, there is a series of decisions in which the contrary view was held. *Kotappa* v. *Raghavayya*[1] is a case referred to by the learned District Munsif, in which it was held that a claim to subrogation to a time-barred mortgage could not be urged by way of defence in a suit to redeem a puisne mortgage. The decision was followed by a single Judge in a case in *Draviam Chettiar* v. *Ramaiya*

1. (1926) 52 M.L.J. 532: I.L.R. 50 Mad. 626.
2. (1912) 22 M.L.J. 468: L.R. 39 I.A. 68: I.L.R. 39 Cal. 527 (P.C.).
3. (1916) 32 M.L.J. 263.
4. (1921) 41 M.L.J. 399.

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Chettiar[1] and it was recognised as good law by a Bench which had to deal with a similar matter in *Aravamudhu Aiyangar* v. *Zamindarini Srimath Abiramavalli Ayah*[2]. There is, however, one decision of a Bench in *Karuppan Chettiar* v. *Venkata Perumal*[3], in which the correctness of the decision in *Kotappa* v. *Raghavayya*[4] was doubted and it was held that the right of a person claiming by subrogation to use the discharged mortgage as a shield was not defeated by 12 years' limitation. This view has been referred to with approval in an *obiter dictum* of Horwill, J., in *Madappaya* v. *Mahabala Rao*[5]. It is pointed out that the decision on this question in *Karuppan Chettiar* v. *Venkata Perumal*[3] was based on an apparently subsidiary argument and was not the main reason for deciding the appeal. It cannot in my opinion be treated as an *obiter dictum*, but it must be noted, with all respect to the learned Judges who decided that case that the matter does not appear to have been discussed at great length. It seems to me that the balance of authority is in favour of the view taken by the Bench which decided *Kotappa* v. *Raghavayya*[4] and I may be permitted to say with all respect that that is the view which commends itself to me as based on logic. It is not the law that limitation can never affect a plea used in defence. Certainly when the plea rests on a right which the defendant had no occasion to agitate until his position was attacked, limitation would not ordinarily affect his defence; but when his defence raises a plea of some inchoate or imperfect right, the establishment of which depended on a suit within a particular time, I see no reason why he should be allowed to urge that defence if the suit which has not been brought would, at the time when he urged the defence, have been time barred. That is the reasoning underlying the cases which prohibit the defendant from pleading a title based on part performance when a suit for specific performance of the contract relied upon would have been barred. Similarly in the case of subrogation, when a man has discharged an earlier mortgage with a view to protecting a later mortgage, there is no real justification for his being put into any better position than the person whom he discharged and there is no real justification for the intermediate mortgagee being put in any worse

1. (1934) 68 M.L.J. 362.
2. (1933) 66 M.L.J. 566.
3. A.I.R. 1929 Mad. 465.
4. (1926) 52 M.L.J. 532: I.L.R. 50 Mad. 626.
5. A.I.R. 1937 Mad. 826.

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position than he would have been as against the original mortgagee. If a suit on the original mortgage is time barred, I see no reason why the person who claims subrogation should be allowed to urge a right higher than that of the mortgagee whom he has discharged, to the detriment of the intermediate mortgage. In this view, I respectfully follow the decision in *Kotappa* v. *Raghavayya*1 and hold that the right to priority claimed by the third defendant is not open to him if the suit on the original mortgage, Ex. I, is time barred.

It is contended that such a suit would not be time barred by reason of the acknowledgment contained in Ex. III. That acknowledgment is merely an acknowledgment of the existence of a decree. It does not even recite that the decree is a decree on a mortgage and it does not certainly purport to acknowledge the subsistence of the debt which has become merged in the decree. I see no parallel between this position and that arising out of the acknowledgment contained in an endorsement on a promissory note, which on the authorities can be treated as an acknowledgment of the subsistence of the original debt. This is a case in which the original mortgage debt had ceased to exist by reason of the decree and the acknowledgment of the existence of the decree cannot in my opinion be taken to be an acknowledgment of the subsistence of the debt which that decree extinguished, so as to save limitation. In the result, therefore, I hold that the third defendant's claim to priority is barred by limitation and I dismiss the appeal with costs of the first respondent.

Leave to appeal is granted.

K. C. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE LAKSHMANA RAO.

Vellanchetty Venkata Narasimham .. *Petitioner** (*Complainant*)

v.

Pinapa Satyanarayanarao and others .. *Respondents* (*Accused*).

Venkata Narasimham v. Satyanarayanarao.

Child Marriage Restraint Act (XIX of 1929), S. 9—Offence under Act—Complaint not made within one year—Time taken in other proceeding—Limitation Act, 1908, S. 14—Applicability.

1. (1926) 52 M.L.J. 532: I.L.R. 50 Mad. 626.

* Crl. R. C. No. 837 of 1938. 27th February, 1939.
(Crl. R. P. No. 795 of 1938.)

Venkata Narasimham v. Satyanarayanarao.

S. 9 of the Child Marriage Restraint Act provides that no Court shall take cognizance of any offence under that Act save upon complaint made within one year of the solemnization of the marriage. And S. 14 of the Limitation Act, which is in terms restricted to civil proceedings, does not apply to a complaint under the Child Marriage Restraint Act. Consequently the time taken in preferring a complaint to another Court within the period of one year cannot be deducted in computing the period of limitation for the complaint subsequently launched.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Sub-Divisional Magistrate of Kandukur in C. C. No. 35 of 1938.

K. Hariprasada Rao, B. Sreeramachandra Rao and *K. Kameswara Rao* for Petitioner.

V. Rajagopalachari for *B. V. Narasu* for Respondents.

K. Venkataraghavachari for *The Public Prosecutor (V. L. Ethiraj)* on behalf of the Crown.

The Court made the following

ORDER.—The marriage was solemnized on 27th June, 1937, and the complaint was made to the Sub-Divisional Magistrate of Kandukur on 21st July, 1938. S. 9 of the Child Marriage Restraint Act (XIX of 1929) provides that no Court shall take cognizance of any offence under that Act save upon complaint made within one year of the solemnization of the marriage and S. 14 of the Indian Limitation Act is in terms restricted to civil proceedings. The making of the complaint to the Sub-Divisional Magistrate of Ongole on 24th June, 1938, is therefore immaterial and the order of dismissal is correct. The revision petition therefore fails and is dismissed.

B.V.V. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN AND MR. JUSTICE LAKSHMANA RAO.

Sadaiammal .. *Appellant* (1st Defendant)*

v.

Angammal and another .. *Respondents (Plaintiff and 2nd Defendant).*

Sadaiammal v. Angammal.

Presidency Small Cause Courts Act (XV of 1882), S. 28—Superstructure which can be removed by tenant—If movable property—Suit to set aside

* C. C. C. A. No. 38 of 1937. 26th January, 1939.

Sadaiammal v. Angammal.

claim order in proceeding arising in execution of a Small Cause Court decree—Cognisability by City Civil Court—Madras City Civil Courts Act, S. 5—Scope.

A decree-holder in a small cause suit sought to attach the superstructure which the defendant, a tenant, would be entitled to remove without the permission of the landlord before the termination of the tenancy. A third party preferred a claim to it which was allowed. A suit was filed in the City Civil Court to set aside the order on the claim petition.

Held, that the superstructure must be deemed to be movable property falling within S. 28 of the Presidency Small Cause Courts Act. The City Civil Court has no jurisdiction to try the suit, as the question arose in execution of the Small Cause Court decree. There is no distinction between questions arising 'in' execution and questions arising 'out of' execution of a Small Cause Court decree.

S. 5 of the Madras City Civil Courts Act does not enable the City Civil Court to entertain suits which are cognisable by the Small Cause Court.

Rajammal v. *Narayanasami Naicker*, (1915) 28 M.L.J. 600: I.L.R. 39 Mad. 219 (F. B.), referred to.

Manicka Chettiar v. *Kuppuswami Naicker*, (1926) 25 L.W. 115, relied on.

Appeal against the decree of the City Civil Court, Madras, dated 19th April, 1937, in O. S. No. 997 of 1936.

V. Krishnamachariar for Appellant.

Rangaswami Aiyangar and *Ramaratnam* for Respondents.

The judgment of the Court was delivered by

Burn, J.

Burn, J.—This is an appeal from the decision of the learned Additional Judge of the City Civil Court in O. S. No. 997 of 1936. The suit was filed by Angammal (the first respondent) to set aside an order made on a claim petition in execution. The plaintiff Angammal was the assignee of a decree in Small Cause Suit No. 8589 of 1925 in which one Venkatachala Naicker was the judgment-debtor. The plaintiff as the assignee decree-holder attached the superstructure, No. 31, Kalmandapam Road, Rayapuram, Madras, as the property of Venkatachala Naicker. Sadayammal, the first defendant in the suit preferred a claim petition alleging that on the 25th September, 1925, Venkatachala Naicker had sold the superstructure to Vembuli Naicker and that subsequently Vembuli Naicker had died leaving the property to his son who on the 14th December, 1934, sold it to the first defendant, the first defendant being the wife of the original owner, while Vembuli Naicker, the vendee from Venkatachala

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Naicker is the son of the first defendant's brother. The claim of Sadayammal was allowed and this suit was filed in the City Civil Court to set aside the order on the claim petition. The learned Additional Judge of the City Civil Court gave the plaintiff a decree and this appeal has been preferred by the first defendant.

The learned Advocate for the appellant has argued only the question of jurisdiction. It was contended in the Court below that the City Civil Court had no jurisdiction in this case. The learned Judge of the City Civil Court overruled this contention on the ground that the Presidency Small Cause Court is precluded from entertaining any suit the subject-matter of which is an interest in immovable property. The learned Judge recognised that S. 28 of the Presidency Small Cause Courts Act excepts the case of property attached to immovable property which the tenant of the immovable property is at liberty to remove without the permission of the landlord before the termination of his tenancy. But the learned Judge thought that this exception was not wide enough to include a suit to set aside a claim order. We think that this decision is incorrect. S. 28 is quite general. It provides that:

"When the judgment-debtor under any decree of the Small Cause Court is a tenant of immovable property, anything attached to such property, and which he might before the termination of his tenancy lawfully remove without the permission of his landlord, shall, for the purpose of the execution of such decree and for the purpose of deciding all questions arising in the execution of such decree, be deemed to be movable property. . . . . ."

It is not disputed that the superstructure in question is a superstructure which the tenant, namely, the appellant would be entitled before the termination of her tenancy of the land to remove without the permission of the landlord. It is in fact only on that ground that the decree-holder in the small cause suit was entitled to attach the superstructure as the property of Venkatachala Naicker. Since the superstructure must be deemed to be movable for the purpose of deciding all questions arising in the execution of the decree the learned Advocate for the appellant is, we think, on good ground when he maintains that the suit ought to have been filed in the Small Cause Court. The Full Bench decision in *Rajammal* v. *Narayanasami Naicker*[1] is

1. (1915) 28 M.L.J. 600: I.L.R. 39 Mad. 219 (F.B.)

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clear that a suit by an unsuccessful party in claim proceedings to recover movable property attached by the Presidency Small Cause Court is not excluded from the jurisdiction of the Presidency Small Cause Court under S. 19, cl. (s) of the Act. The City Civil Court can only entertain suits which are not cognisable by the Small Cause Court (*vide* S. 3 of the Madras City Civil Courts Act). We think therefore that the learned Advocate for the appellant is right when he contends that the City Civil Court had no jurisdiction in this case. The learned Advocate for the first respondent-plaintiff points out that by S. 5 of the City Civil Courts Act every person appointed a Judge of the City Court shall be, by virtue of his office, a Judge of the Small Cause Court with respect to cases cognisable by that Court, and he invites us to say that therefore the Additional Judge of the City Civil Court had jurisdiction to try the suit. This, however, we think, is unsound. S. 5 does not enable the City Civil Court to entertain suits which are cognisable by the Small Cause Court. This S. 5 is only intended to give authority to the Judges of the City Civil Court to try small cause suits when they are transferred, when the Chief Justice of this High Court directs the Judge of the City Civil Court to try cases of a small cause nature. As has been pointed out by Sir Murray Coutts-Trotter, C. J., in *Manicka Chettiar* v. *Kuppuswami Naicker*[1]:

"The object of S. 5 of the City Civil Courts Act is to enable the Chief Justice to prescribe generally the duties to be performed by a Judge of the City Civil Court when transferred to the Small Cause Court for any substantial period and not to enable the Chief Justice to interfere with regard to the transfer of particular cases and create a City Civil Court Judge a Small Cause Court Judge *ad hoc* with reference to an individual case."

The learned Advocate for the first respondent-plaintiff has attempted to distinguish between questions arising 'in' the execution of a small cause decree and questions arising 'out of' the execution of such a decree. He agrees that for the decision of any question arising 'in' the execution of the decree in Small Cause Suit No. 8589 of 1925, the superstructure would have to be deemed to be movable property by reason of S. 28 of the Presidency Small Cause Courts Act, but he contends that this suit has really arisen 'out of' execution proceedings and therefore S. 28 will not be applicable. We do not think that this distinction is one of substance. We are

1. (1926) 25 L.W. 115.

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unable ourselves to distinguish between questions arising 'in' execution and questions arising 'out of' execution.

The point in dispute between the appellant and the first respondent undoubtedly arose in execution of the small cause decree. It was because of that question that the claim petition was filed and under the rules the order passed on the claim petition is conclusive, subject to the result of any suit which may be filed by the defeated claimant.

Agreeing with the learned Advocate for the appellant, we hold that the City Civil Court had no jurisdiction to try this suit. We therefore set aside the decree of the learned Additional Judge and direct him to return the plaint to the plaintiff for presentation if so advised to a competent Court. The appellant will recover her costs of this appeal from the first respondent. We make no order with regard to the costs of the trial Court.

K.C. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

The Secretary of State for India in Council represented by the Collector of Kistna .. *Appellant* in S. A. No. 161 of 1935 and Respondent in S. A. No. 177 of 1935 (Defendant)*

v.

Sri Rajah Venkata Ramayya Appa Rao Bahadur Zamindar Garu .. *Respondent in S. A. No. 161 of 1935 and Appellant in S. A. No. 177 of 1935 (Plaintiff).*

Secretary of State for India v. Sri Rajah Venkata Ramayya Appa Rao Bahadur Zamindar Garu.

Local Boards Act (XIV of 1920, as amended by XI of 1930), Ss. 78 and 79 (3)—Land cess levied on landlord for leasing out land for grass cutting—Payment within meaning of 'rent'—Fishery in South Indian tank—Levy of cess on land under water for occupation—Justifiable.

Whether land used for quarrying or for grazing or for cutting grass is occupied by tenants or not, it is clear that the rental value of such land is liable to be taxed under S. 79 of the Madras Local Boards Act (XIV of 1920

* S. A. Nos. 161 and 177 of 1935. 25th January, 1939.

as amended by Act XI of 1930). If it is considered as being in the occupation of the person who takes a lease with grazing or grass-cutting rights or pays royalty for quarrying, all these payments would come within the term 'rent' and land cess would be payable under the first part of cl. 3 of S. 79.

Manindra Chandra Nandi v. *Secretary of State for India*, (1907) I.L.R. 34 Cal. 257 at 284 and Woodfall on 'Landlord and Tenant' (23rd Edn. page 491), relied on.

Where the plaintiff appealed against the decision of the lower Court confirming the cess levy of the Government on the annual rental value of the land in his possession under S. 78 of the Local Boards Act,

Held, the plaintiff should prove positively that the cess which had been enforced was unlawful and for that he should place all the facts for any inference he would like the Court to draw.

If a landholder leases the right of occupation of a tank in South India to a tenant so that the latter may enjoy the land and the water therein by catching fish, then the payment made by the tenant is a rent, so that, whether one brings this occupation under the first part or the second part of cl. (3) of S. 79, the income derived by the landholder in the first case, or the rental value of the tank as calculated in the manner laid down in the second part would form the basis of a land cess.

A tank as known in South India is essentially land, though to some extent covered with water for a considerable portion of the year.

Appeals against the decree of the Court of the Subordinate Judge of Bezwada in A. S. No. 12 of 1934 preferred against the decree of the Court of the District Munsiff of Bezwada in O. S. No. 558 of 1932.

The Government Pleader (*B. Sitarama Rao*) for Appellant.

Y. Govindarajulu for Respondent.

The Court delivered the following

JUDGMENT.—These two appeals arise from the same judgment in a suit preferred by a zamindar to recover a sum of money alleged to have been illegally collected by the Government by way of land cess from the plaintiff. S. A. No. 161 is preferred by the Government with reference to the decree granted in respect of the cess calculated on fishery rentals. S. A. No. 177 is an appeal by the plaintiff against the dismissal of his suit so far as it relates to the cess calculated on income from quarries, grazing fees and sale of grass. The land cess in question is levied under S. 78 of the Madras Local Boards Act (XIV of 1920 as amended by Act XI of 1930), being calculated on the annual rental value of all occupied lands on whatever tenure held in the manner laid down in S. 79. With reference to zamindari lands such as those covered by the present suit, sub-S. 3 is applicable and the basis of the cess is (1) in case of lands occupied by a tenant, the annual rent payable to the landholder together with water

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rate; (2) in case of lands occupied by the owner himself, the rental value calculated according to the rates of rent paid by an occupancy ryot for similar land in the neighbourhood. The cess has been levied by the Collector on the footing of the second part of cl. 3 of S. 79, namely, on the ground that the lands in question are in the occupation of the zamindar; and the revenue officers have found that if the zamindar had been taxed on the basis of the rental value of similar lands held on ryotwari tenure, the amount payable would have been considerably more than that which has been actually levied, the levy having been restricted to a rental value calculated on the basis of income actually received from those lands. Now, whether land used for quarrying or for grazing or for cutting grass is occupied by tenants or not, it seems to me fairly clear that the rental value of such land is liable to be taxed. If it is considered as being in the occupation of the person who takes a lease with grazing or grass-cutting rights or pays royalty for quarrying, then to my mind quite clearly all these payments would come within the term 'rent' and land cess would be payable under the first part of sub-cl. 3. It has been argued that a royalty or seigniorage charge for quarrying cannot be rent because it is a payment for the removal of a portion of the land and not a contractual charge for the use of the land. This argument runs directly contrary to a line of English decisions summarised in Woodfall on 'Landlord and Tenant', 23rd Edn., page 491 and applied by a Bench of the Calcutta High Court in *Manindra Chandra Nandi v. Secretary of State for India*[1]. The true way of regarding the matter really is that a royalty for minerals is not really the purchase price for the sale of the minerals, but a contractual payment for the use of land for a purpose which involves the removal of the minerals and to that extent reduces the value of the land, but does not take away the land. If, owing to the unlocalised or unexclusive nature of the user granted in any of these cases, it were to be held there was no occupation by the tenant, then there would clearly be occupation by the landholder himself and the second part of cl. 3 of S. 79 would come into play. Whether the user is of such a character as to be reasonably described as occupation, must very largely be a question of fact. Since the plaintiff has taken upon himself the task of showing that a tax levied by the Collector, whose

1. (1907) I.L.R. 34 Cal. 257 at 284.

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decision has been confirmed by the Board of Revenue under S. 86 of the Act, is unlawful, he cannot get any relief from the Court except by proving positively that the tax which has been imposed is unlawful; and for this purpose it is necessary for him to place before the Court facts which would justify the necessary inference. I have no hesitation in concluding that the lower appellate Court's decision is correct in so far as it relates to the cess based on grazing, grass cutting and quarrying income dealt with in S.A. No. 177 of 1935 which must be dismissed with costs.

Turning to the appeal of Government, S.A. No. 161, the position is not so clear. It has been argued that income derived from fisheries is not rent nor is it income derived from land in any sense of the word. I have been referred to English cases in which the lease of an exclusive right of fishery in a particular stretch of water has been held to be an incorporeal hereditament and I have been referred to cases under the Income-tax Act in India in which rent from fisheries has been held not to be agricultural income. It seems to me that neither of these classes of cases gives very much assistance in deciding the question before me. It is not a question whether the leasing of a right of fishery is an incorporeal hereditament but a question whether the income derived therefrom is rent for the occupation of land, which is really quite a different matter: nor is it a question whether a fishery rent is income from agriculture; for in my opinion the rental value which is the basis of assessment under S. 79 of the Local Boards Act is clearly not confined to agricultural land, but includes royalties for minerals and in fact rent in its widest form. I also doubt the applicability of English cases regarding fishery rights to Indian conditions. The leasing of a fishery in England normally implies the grant of a right to catch fish with rod and line or with net in a river or a permanent sheet of water. The leasing of a fishery in a South Indian tank involves nothing of the kind. In the first place the tank, though it is land more or less covered by water for a portion of the year, is ordinarily dry land for another portion of the year and the fish though they are denizens of the water in the cold weather are denizens of the land and the mud in the hot weather, for they go down into the mud when the tank goes dry. The process of catching the fish is also decidedly different for normally it is a procedure whereby,

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when the water has almost completely gone the fisherman drives the fish into a shallow muddy depression and catches them with his hands. Looking at the question, therefore, without reference to decided cases, I am of opinion that a tank as known in South India is essentially land though to some extent covered with water for a considerable portion of the year. If that land is in the occupation of the zamindar yielding him income in the nature of rent for the use thereof, then to my mind his occupation is taxable. If he leases the right of occupation to a tenant, so that the latter may enjoy the land and the water thereon by catching fish, then the payment made by the tenant is in my opinion a rent; so that, whether one brings this occupation under the first part or the second part of cl. (3) of S. 79, I am of opinion that the income derived by the landholder in the first case, or the rental value of the tank as calculated in the manner laid down in the second part in the latter case, would form the basis of a land cess. It has not been shown that the calculation based on actual receipts of fishery rent is in excess of what the rental value would be when calculated on the basis of the rent payable for similar lands in the neighbourhood. In fact there is a finding by the revenue authorities that the strict method of calculation would have been disadvantageous to the landholder. In the result I allow S.A. No. 161 with costs and dismiss the plaintiff's suit.

Leave granted in S. A. No. 161.

K.C. ——— *S. A. No. 177 dismissed.*
S. A. No. 161 allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN AND MR. JUSTICE LAKSHMANA RAO.

Etti and another .. *Appellants** (*Plaintiffs*)

v.

The Secretary of State for India in Council .. *Respondent* (*Defendant*).

Etti v. Secretary of State for India.

Tort—Damages—Hospital maintained by Government for public at public expense—Tort by a member of the staff of the hospital—Secretary of State for India in Council if liable therefor in damages.

Where a person left his infant son in a Government Hospital for treatment but when he went back to take the child, he found that the child had been taken away by somebody else, and it was assumed for the purpose that an actionable tort had been committed by some person employed on the staff of the Hospital,

* C.C.C. Appeal No. 21 of 1937. 3rd February, 1939.

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Held, that the Secretary of State for India in Council cannot be sued in damages for the loss, as in maintaining a hospital as the one in question for the benefit of the pubic at the expense of the public revenues, the Government is discharging a proper function of Government within the principle enunciated in the *Peninsular and Oriental Steam Navigation Company* v. *Secretary of State for India in Council*, (1868) 5 Bom.H.C.R. App. A.

Appeal against the decree of the Additional City Civil Judge of the Court of the City Civil Judge at Madras in O. S. No. 919 of 1935 (Pauper).

M. Ranganatha Sastri and *N. Yegneswara Sastri* for Appellants.

The Government Pleader for Government.

The judgment of the Court was delivered by

Burn, J.

Burn, J.—This is an appeal from the decision of the learned Additional Judge of the City Civil Court in O.S. No. 919 of 1935. This suit was filed *in forma pauperis* by a man and his wife living in Madras for Rs. 3,000 as damages against the Secretary of State for India in Council. The plaintiff's case as set out in the plaint was that on 4th December, 1933, the first plaintiff and his brother took the infant son of the plaintiffs to the Government Hospital for Women and Children, Egmore, Madras, for treatment. The child was two or three days old. About the 11th December, the nurse in charge of the Children's ward at the Hospital is said to have told the first plaintiff and his brother that the child was cured and might be taken away, but before taking the child away, the first plaintiff was advised to buy a piece of rubber apparatus. The first plaintiff and his brother went away and bought this appliance, went back to the hospital the same day to fetch the child away, and were then informed by the nurse that the child had been taken away by some one else. The plaintiffs sought for the child in every possible place. The first plaintiff reported the matter to the police, but the police were unable to find the child. On those facts, it was alleged that the loss of the child was due to the negligence of the "hospital authorities". It was also alleged that "the hospital authorities" had committed a breach of contract in failing to return the child to its parents or their nominees, and that they were also guilty of misfeasance, non-feasance and malfeasance in handing over the child to some unknown person. The plaintiffs estimated the damages sustained at Rs. 3,000 and filed the suit, as already stated, against the Secretary of State for India in Council.

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The learned Additional Judge of the City Civil Court discussed the following issues as preliminary matters with the consent of both parties:—

1. Is there any valid and binding contract between the plaintiffs and the Secretary of State for India in Council?

2. If there is no such contract, is the defendant liable in damages under S. 65 or under S. 70 of the Indian Contract Act?

3. Is not the tort, if any, founded on contract: and if there is no contract between the plaintiffs and the defendant, is the defendant liable in tort?

4. Is the defendant liable in tort?

The learned Judge held that there was no valid and binding contract and that the defendant could not be said to be liable in damages under S. 65 or S. 70 of the Indian Contract Act. The third issue was not pressed before him on behalf of the defendant. On the fourth issue, the learned Judge held that the defendant was not liable in tort. The plaintiffs have filed this appeal.

The suit was filed against the Secretary of State for India in Council under S. 32 of the Government of India Act, 1915. The material portions of that section are as follows:—

1. The Secretary of State in Council may sue and be sued by the name of the Secretary of State in Council as a body corporate.

2. Every person shall have the same remedies against the Secretary of State in Council as he might have had against the East India Company if the Government of India Act, 1858, and this Act had not been passed. ....

Put briefly, the case for the plaintiffs is that in such a case as this, the East India Company would have been liable for the torts of its servants, and therefore the Secretary of State for India in Council is liable for the torts of the staff of the Government Hospital for Women and Children. Learned Counsel for the appellants has relied in this Court, as he did in the lower Court, on the leading case of the *Peninsular and Oriental Steam Navigation Company v. Secretary of State for India in Council*[1]. That is, of course, a very well-known case. The substance of the ruling is given in the headnote as follows:—

"The Secretary of State in Council for India is liable for the damages occasioned by the negligence of servants in the service of Government if the negligence is such as would render an ordinary employer liable."

The P. & O. Company sued the Government for damages occasioned by injuries caused to a horse belonging to them. Their carriage was being driven along a public road passing between two portions of the Government dockyard at Kidderpore. Some coolies in the service of the Government were carrying a

1. (1868) 5 Bom.H.C.R. App A.

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piece of funnel casing from the works on one side of the road to the works on the other side of the road, and owing to their negligence, a horse drawing the plaintiff's carriage was seriously injured. The learned First Judge of the Calcutta Court of Small Causes stated a case for the opinion of the Supreme Court on the question of the liability of the Secretary of State for India for the damages occasioned to the plaintiffs. The learned Judges, Sir Barnes Peacock, C. J. and Jackson and Wells, JJ., held that the Secretary of State for India in Council was liable to the plaintiffs on the facts found by the learned Judge of the Court of Small Causes. The provision of law under which the Secretary of State for India in Council was held responsible was S. 65 of the Act for the better Government of India, 21 & 22 Vict., Ch. 106. That was in the same terms as S. 32 of the Government of India Act, 1915, already quoted. The learned Judges drew a distinction between acts done by the Government in the exercise of sovereign powers and acts done by Government in the conduct of undertakings which might be carried on by private individuals to whom sovereign powers had not been delegated. Sir Barnes Peacock said:

"There is a great and clear distinction between acts done in the exercise of what are usually termed sovereign powers, and acts done in the conduct of undertakings which might be carried on by private individuals without having such powers delegated to them."

In the former case, the learned Chief Justice and the other Judges held that the Secretary of State for India in Council would not be liable for the torts of its servants, but in the latter case he would. Learned Counsel for the appellants relies entirely upon the words quoted above from the judgment of Sir Barnes Peacock. He points out that any private individual may carry on a hospital for women and children in precisely the same way that the Government Hospital for Women and Children, Egmore, is carried on by the Government. He goes further than that. He points out that the history of the institution is that it actually began as a private hospital. It was started by a number of private individuals acting jointly and was later taken over by the Government. Learned Counsel argues that the case therefore falls within the dictum of Sir Barnes Peacock. This contention however entirely fails to take into consideration the facts of the *P. & O. case*. The Kidderpore dockyard, as appears from the judgment in the case, was being maintained by the East India Company for the repair of their river steamers,

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which carried both passengers and goods for hire. This dockyard was taken over by the Government from the East India Company. This is the principal fact in the case which must not be lost sight of when considering the distinction drawn by Sir Barnes Peacock between acts done in the exercise of sovereign powers and acts done in the conduct of undertakings which might be carried on by the private individuals. It is quite clear that Sir Barnes Peacock was considering undertakings of a business or commercial nature. There is no analogy whatever between the carrying on of a dockyard for the purpose of repairing steamers engaged in commercial traffic, and the carrying on of a hospital for the purpose of curing the diseases of women and children. Learned Counsel for the appellants objects to the proposition that the Secretary of State's immunity is taken away only in cases where the Government is engaged in undertakings of a commercial or a business character. He wishes to rely on the letter of the dictum of Sir Barnes Peacock. This is, in our opinion, clearly unsound. The judgment of Sir Barnes Peacock has been referred to in many cases subsequently, and it has, we think, always been recognised that the learned Chief Justice was there dealing with undertakings of a business or commercial character; vide *McInerny* v. *Secretary of State for India*[1], where Mr. Justice Fletcher held that the Government were not liable for damages sustained by the plaintiff through coming in contact with a post set up by the Government on a public road on the Calcutta *maidan*. After referring to the *P. & O. case*, the learned Judge enquires:

"This case is a case to make the Government liable to pay compensation out of Government revenues. What for? For an act which happened to the plaintiff on the public highway. What commercial undertaking or other trading operation were the Government of India carrying on in maintaining the public path on the public highway?"

Sir George Rankin, C. J., explains the *P. & O. case* in similar language in *Secretary of State for India in Council* v. *Shreegobinda Chaudhuri*[2]; the learned Chief Justice observes with regard to the *P. & O. case*:

"It was an action in tort and the matter, having come before this Court, on a reference from the Small Cause Court, and it being contended that the Secretary of State for India in Council was not liable, this Court decided that there was a distinction between a busines or merchantile concern carried on by the East India Company, whether for its own private or for public benefit, and acts done in connection with Governmental power or powers

1. (1911) I.L.R. 38 Cal. 797. 2. (1932) I.L.R. 59 Cal. 1289 at 1293.

which could not be lawfully exercised save by the sovereign or an individual delegated by the sovereign to exercise such powers"

It is impossible in our opinion to treat the dictum of Sir Barnes Peacock as though it had been intended to cover cases of an institution such as a hospital, which may be maintained by private persons as well as by Government. The real question is, as the learned Judge of the Court below has found, whether the Government in maintaining the Hospital for Women and Children, Egmore, is discharging a function of Government. There is no allegation that that Hospital is maintained by the Government as a commercial or business undertaking. It is admittedly maintained out of public revenues. Now, by S. 20 (1) of the Government of India Act, the Revenues of India can only be applied for the purposes of the Government of India. The maintenance of hospital is a proper object for the expenditure of the public revenues, *vide* item (2) in Part II of Sch. I appended to the Devolution Rules framed under S. 45-A of the Government of India Act. That section authorises the framing of rules:

"For the classification of subjects, in relation to the functions of Government as central and provincial subjects, for the purpose of distinguishing the functions of Local ?, vernments and Local Legislatures from the functions of the Governor-General in Council and the Indian Legislature."

In maintaining a hospital such as this for the benefit of the public at the expense of the public revenues, we are quite clear that the Government is discharging a proper function of Government, and that under the principle enunciated in the *P. & O. case* and in many subsequent cases, the Secretary of State is not liable for the torts of his servants employed in the hospital.

We have been referred to a large number of cases by learned counsel for the appellants, but there is nothing in them which supports his contention, unless the dictum of Sir Barnes Peacock is taken literally, without any reference to the facts of the *P. & O. case.* The case which is most nearly parallel to this is, we think, *The Secretary of State* v. *Cockcraft*[1]. In that case, Sir John Wallis expresses the view that in maintaining a road, and more particularly in maintaining a military road, the Government were exercising a function of Government and that consequently the Secretary of State for India in Council was not liable for damages occasioned to the plaintiff by the

1. (1914) I.L.R. 39 Mad. 351.

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careless stacking of gravel on road by the persons engaged to carry out the work of repairs. It is not necessary, in our opinion, to refer to the other cases which have been cited. The learned Additional Judge of the City Civil Court has dealt with all the important cases, and we have scarcely anything to add to his able and accurate exposition of the law on this point.

Learned Counsel did not seriously press before us the claim of the plaintiffs based upon contract, and quite rightly, as it is clear that none of the proper formalities necessary to bind the Secretary of State in a case of contract was observed in this case. This appeal must therefore be dismissed.

The learned Judge of the Court below did not direct the plaintiffs to pay the Government's costs, and the learned Government Pleader has not pressed before us the question of the costs in the lower Court. If he had, we should have been disposed to say, as Sir George Rankin, C.J., said in *Secretary of State for India* v. *Shreegobinda Chaudhuri*[1], that there is no justification for making the tax-payer contribute a single penny towards the costs of the suit. The plaintiffs were very ill-advised in filing this suit against the Secretary of State for India in Council, but since the learned Judge of the Court below did not award costs against them, we shall not interfere with his decree in that respect. We shall however direct that the appellants must pay the costs of the respondent in this appeal, since whatever grounds there might have been for filing a suit, there were certainly none for preferring this appeal.

It is necessary to note that the learned Judge of the Court below proceeded on the assumption that an actionable tort had been committed by some person employed on the staff of the Hospital for Women and Children. The learned Government Pleader does not admit the soundness of that assumption; he is prepared to contend that the plaintiffs, on the facts of this case, had no cause of action in tort against anybody. We express no opinion on that question, as it was not discussed in the lower Court, and a decision of it is not necessary for the purposes of this appeal. The plaintiffs must pay the court-fees.

R. Sundaralingam for *N. Yegneswara Sastri*, Advocate, for the appellants asks for a certificate under S. 205 of the Government of India Act, 1935. This case does not involve a substantial question of law as to the interpretation

1. (1932) I.L.R. 59 Cal. 1289.

of the Government of India Act, 1935, or any order in Council made thereunder. We must therefore decline to give a certificate.

S. V. V. —— *Appeal dismissed.*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN.

Noone Varadarajan Chetty .... *Petitioner* (Petitioner)*

v.

Vutukuri Kanakiah .. *Respondent (Respondent).*

Varadarajan Chetty v. Kanakiah.

Income-tax Act (XI of 1922), S. 54—Secondary evidence, whether admissible—Income-tax Officer whether could be asked to produce documents mentioned.

S. 54 of the Income-tax Act lays a prohibition on the Court. It does not confer any exemption on the Income-tax officer; on the contrary he is subject to every process of the Court, though under S. 54 the Court cannot require him to produce before it any of the documents mentioned in that section.

Petition under S. 115 of Act V of 1908 and S. 224 of Government of India Act, praying the High Court to revise the order of the District Court of Nellore dated 21st January, 1938, in I.A. No. 175 of 1937 in O.S. No. 30 of 1937.

K. Bashyam and *T. R. Srinivasan* for Petitioner.

R. Tirumalatatachariar for Respondent.

The Court delivered the following

JUDGMENT.—In my opinion the decision of the learned District Judge is correct.

Secondary evidence of the contents of the Income-tax return is admissible, according to the contention of learned counsel for the petitioner, under S. 65 (*a*) of the Evidence Act. I am however unable to agree that the Income-tax Officer is "not subject to the process of the Court". On the contrary he is subject to every process of the Court, but under S. 54 of the Income-tax Act, the Court cannot require him to produce before it any of the documents mentioned in that section. S. 54 of the Income-tax Act lays a prohibition on the Court; it does not confer any exemption on the Income-tax Officer.

There is no other provision of law under which secondary evidence would be admissible.

This petition is accordingly dismissed with costs.

K.C. —— *Petition dismissed.*

* C.R.P. No. 134 of 1938. 16th February, 1939.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

P. E. R. M. Annamalai Chetty, Joint Firm, Palni, through its partner P. E. Rama Periya Karuppan Chettiar .. *Appellant** (*Plaintiff*)

v.

Satyavadivel Muthuswami Maniagaran and others .. *Respondents* (*Defendants 3, 1 and 2*).

Annamalai Chetty v. Muthuswami Maniagaran.

Hindu law—Natural guardian of minor—Covenant to contract a simple loan—Whether binding on minor's estate—Limits of natural guardian's powers—No distinction between simple loans and secured debts.

On the questions as to the limits within which a natural guardian under Hindu law can incur a simple contract debt so as to bind the minor's estate, and whether there exists any distinction between simple loans and loans borrowed on the security of property,

Held, that no such distinction exists. In the face of overwhelming authority which clearly binds this Court, only one conclusion is possible that *Hunoomanpersaud's case*, (1856) 6 M.I.A. 393, contains the true test for deciding the binding character of even a simple loan. Justice and equity, regarded both from the point of view of the minor and the lender, are in consonance with the view which has been all along accepted in this Court, vide *Ramajogayya* v. *Jagannadham*, (1918) 36 M.L.J. 29: I.L.R. 42 Mad. 185 (F. B.) and *Satyanarayana* v. *Mallayya*, (1934) 68 M.L.J. 540: I.L.R. 58 Mad. 735 (F.B.). The statement of the law in Trevelyan on 'Minors' at page 169 merely purports to state the effect of the cases mentioned in the footnote, without noticing the course of decisions in this Presidency interpreting the Privy Council decisions. This is a serious omission which is sufficient in itself to deprive the statement of real value, so far at any rate as this Court is concerned.

Appeal under cl. 15 of the Letters Patent against the decree of the Hon'ble Mr. Justice Venkataramana Rao dated 2nd March, 1936, in S. A. No. 492 of 1934, preferred to the High Court against the decree of the Court of the Subordinate Judge of Dindigul in A. S. No. 96 of 1932 preferred against the decree of the Court of the District Munsiff of Palni in O. S. No. 352 of 1931, etc.

A. C. Sampath Aiyangar for Appellant.

B. Sitarama Rao for Respondents.

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* L. P. A. No. 39 of 1936 and C. M. P. No. 943 of 1939. 24th February, 1939.

Annamalai Chetty v. Muthuswami Maniagaran.

Krishnaswami Aiyangar, J.

The judgment of the Court was delivered by

Krishnaswami Aiyangar, J.—This is an appeal uuder the Letters Patent against the judgment of Venkataramana Rao, J., in S. A. No. 492 of 1934. By that judgment he has reversed the decree of both the lower Courts and dismissed the suit with costs throughout.

The appeal raises a question of importance involving a decision as to the limits within which a natural guardian under Hindu law can incur a simple contract debt so as to bind the minor's estate. That such a guardian has the power to borrow by charging, mortgaging or even by selling the estate or a sufficient portion of it, for purposes termed necessary or beneficial according to that law, cannot at this time of the day be questioned. It is also settled that even in the absence of a proved necessity or benefit, an honest creditor can still recover the debt from the estate if he can show that in advancing the money he acted in the *bona fide* belief after due enquiry, that the guardian was acting for such a purpose in incurring the debt. These principles which are based as much on Hindu law as on general considerations of equity, have been held to afford a test of the validity of similar transactions by other persons also who occupy an analogous position. The manager of a joint family governed by the Mitakshara, female owners in possession of inherited property, the head of a Mutt, and the Dharmakartha of a temple are among the class of persons whose powers are so limited. Indeed it can be truly said that what the Judicial Committee said with regard to a guardian in *Hunoomanpersaud's case*[1], has become an integral part of the branch of the law relating to the borrowing powers of all qualified owners. In the case of all such persons there exists in fact, no difference in the test to be applied whether the money is obtained by pledge or sale of the property, or by way of a simple loan.

The decision of Venkataramana Rao, J., if we understand it aright, appears to introduce into this branch of the law a distinction between simple loans and loans borrowed on the security of property and to lay down with respect to the former a stricter rule than that which obtains in the latter. We are no doubt in this case concerned with the powers of a mother and natural guardian but it is none the lesss necessary to bear in mind

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1. (1856) 6 M.I.A. 393.

Annamalai Chetty v. Muthuswami Maniagaran.

Krishnaswami Aiyangar, J.

that any interference with a rule so general in its application as that laid down in *Hunoomanpersaud's case*[1] may tend to create uncertainty in the administration of the law as regards also the other persons, who belong to the same group and are governed by the same principles. We should therefore hesitate to sanction a departure from what appears to be a well-established principle unless we are satisfied that there is clear authority to the contrary.

The learned Judge has expressed the opinion that the law is correctly summed up in the following statement in Trevelyan on 'Minors' at page 169:—

"Although a guardian may under certain circumstances sell or charge the ward's property he cannot bind the ward personally by a simple contract debt, by a covenant, or by any promise to pay money or damages unless such promise is made merely to pay or to keep alive the debt for which the ward's property was liable"

This passage means according to Venkataramana Rao, J., as indeed it does seem to mean, that a guardian cannot, without charging the estate, contract so as to bind the minor, except it be to pay or keep alive a debt already in existence, and binding on the estate. On this view a pre-existing debt or liability could alone support a simple contract debt and not necessity, nor benefit. In fact he says that:

"The test is not a mere question of benefit nor the mere fact that the debt was incurred for necessary purposes; the observations made in some of the cases that where the debt is incurred by the guardian for necessary purposes, his estate can be rendered liable are too broadly made."

The learned advocate for the respondent has been unable to cite any authoritative precedent which recognises such a distinction between the one class of debts and the other. In support of his view Venkataramana Rao, J., has referred to the decision of the Privy Council in *Indur Chunder Singh* v. *Radhakishore Ghose*[2] as authority for the proposition:

"That the considerations by which the validity of a charge is judged are not the same in adjudging the binding nature of a contract or a covenant entered into by the guardian."

We can find no such proposition laid down in this decision or indeed in any other decision to which our attention was drawn except the one in *Maharana Shri Ranmalsingji* v. *Vadilal Vakhatchand*[3]. This case however cannot, after the

1. (1856) 6 M.I.A. 393.
2. (1892) L.R. 19 I.A. 90: I.L.R. 19 Cal. 507 (P.C.).
3. (1894) I.L.R. 20 Bom. 61.

Annamalai Chetty v. Muthuswami Maniagaran. — Krishnaswami Aiyangar, J.

Full Bench ruling in *Ramajogayya* v. *Jagannadham*[1], be regarded as stating the law correctly on the point. That ruling as we understand it lays down the proposition that the same test is applicable to both classes of borrowings. The majority view was that

> "No decree should be passed against the minor or his estate on a contract entered into on his behalf by a guardian under which covenant no charge is created on the estate except in cases in which the minor's estate would have been liable for the obligations incurred by the guardian under the personal law to which he is subject."

A reading of the judgment makes it plain that the observations of the Privy Council in *Waghela Rajsanji* v. *Shekh Masludin*[2] are not to be understood literally so as to preclude the recognition of a larger power in the guardian where the personal law of the minor confers it. Wallis, C. J., who delivered the dissenting judgment was inclined to accept the more limited construction of the guardian's power taken in *Maharana Shri Ranmalsingji* v. *Vadilal Vakhatchand*[3]. He would limit it to *necessaries* supplied to the minor within S. 68 of the Contract Act though in deciding what should be regarded as necessaries, the position of the minor and the expenses which are properly chargeable to his estate under the personal law by which he is governed may have to be taken into account. That this is his view appears from the observation that

> "What are necessaries must depend upon the facts of each case, and in the case of a Hindu, money advanced for the expenses of a marriage which the minor has to perform or to pay off a debt binding on him may be recoverable under this head from his estate."

Apart from necessaries, there is also the power to acknowledge an already existing valid debt or a promise to pay it, which though denied in *Maharana Shri Ranmalsingji* v. *Vadilal Vakhatchand*[3] has been since recognised in *Annapagauda* v. *Sangadigyapa*[4] which on this point overruled the earlier decision. According to the learned Chief Justice, all the decisions are capable of being brought under one or other of these two heads of liability, which are both *independent of contract*. A direct contractual liability enforceable against the estate, had been, according to him, definitely negatived by the Privy Council.

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1. (1918) 36 M.L.J. 29: I.L.R. 42 Mad. 185 (F.B.).
2. (1887) L.R. 14 I.A. 89: I.L.R. 11 Bom. 551 (P.C.).
3. (1894) I.L.R. 20 Bom. 61.
4. (1901) I.L.R. 26 Bom. 221 (F.B.).

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If, as the Chief Justice was inclined to hold, the term 'necessaries' is understood in an expanded sense so as to cover all those purposes which are sufficient according to Hindu law to support an alienation the difference virtually disappears, leaving only the head of benefit about which as an independent source of authority there has been a conflict of opinion. Seshagiri Aiyar, J., with whom Ayling, J., concurred, took a more liberal view, and rested the decision on what he described as the broader ground, disclosed by the decisions of the Courts in the Madras and the other Presidencies. Differing from the Chief Justice he held that there was a power in the guardian by *contract* to bind the minor's estate according to Hindu law, if the circumstances indicated a case of necessity or benefit. On an examination of the cases both before and after the Privy Council decision in *Waghela Rajsanji's case*[1], he reached the conclusion that according to all the High Courts the liability of the minor under the Hindu law is not affected by the circumstance that it was the guardian who had incurred the obligation. That result was in his opinion not opposed to the decisions of the Privy Council, as their Lordships should not be held to have intended 'to lay down that under no circumstances can the guardian bind the estate of the ward, except it be by creating a charge". As we understand it, the difference in *Ramajogayya* v. *Jagannadham*[2], between the Chief Justice on the one hand and the other two learned Judges on the other, consisted in the former denying a power in the guardian to bind the minor by *contract* apart from necessaries, while the latter admitted such a power to reside in him subject however to the conditions imposed by the personal law of the minor. The passages occurring at page 195 make it sufficiently clear that no distinction is to be made between a charge, and a simple loan according to this decision, and none seems to exist on principle, so far as we could see.

It is perhaps unnecessary to undertake a re-investigation of the earlier case-law which appears to have been amply considered in the Full Bench decision which we regard as furnishing a binding precedent for the decision of this appeal. In that case the money had been borrowed on a mortgage which was however

1. (1887) L.R. 14 I.A. 89: I.L.R. 11 Bom. 551 (P.C.).
2. (1918) 36 M.L.J. 29: I.L.R. 42 Mad. 185 (F.B.).

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ineffectual as the property was inalienable; yet the debt was declared enforceable against the estate on the ground that it had been incurred for a necessary purpose. In *Subramania Aiyar* v. *Arumugha Chetty*[1], the minor's estate was held liable on a promissory note executed by the mother to raise money for discharging the minor's share of a prior family debt contracted by the uncle and manager. Two Privy Council decisions *Waghela Rajsanji* v. *Shekh Masludin*[2] and *Indur Chunder Singh* v. *Radhakishore Ghose*[3] were referred to, and distinguished on the ground that in them there was no 'pre-existing liability' such as there was in the case before the Court. But it is to be observed that there is really nothing in this judgment to support the theory, that necessity by itself could not justify the incurring of the debt. We feel no doubt that the reference to a 'pre-existing liability' was only illustrative of the general doctrine of necessity on which the decision in fact proceeded. This case was followed in *Duraisami Reddi* v. *Muthial Reddi*[4] and *Venkitaswami Naicker* v. *Muthuswami Pillai*[5], in both of which a guardian had executed simple bonds, as also in *Krishna Chettiar* v. *Nagamani Ammal*[6], in which the liability was sought to be charged on a promissory note. In all these cases it will be seen that it was the test laid down in *Hunoomanpersaud's case*[7] that formed the basis of the decision. The criticism that these decisions did not give full effect to the opinion of the Privy Council expressed in *Waghela Rajsanji* v. *Shekh Masludin*[2] and *Indur Chunder Singh* v. *Radhakishore Ghose*[3], led to the reference in *Ramajogayya* v. *Jagannadham*[8] with the result already mentioned. The case of *Ramakrishna Reddiar* v. *Chidambara Swamigal*[9], though not a case of debt is noteworthy for the way in which the learned Judges understood the effect of the Full Bench decision. Wallace, J., considered that *Krishna Chettiar* v. *Nagamani Ammal*[6], which had held that a promissory note executed by a guardian of a Hindu minor *for purposes binding on him* is enforceable against his estate, fell directly

1. (1902) I.L.R. 26 Mad. 330.
2. (1887) L.R. 14 I.A. 89: I.L.R. 11 Bom. 551 (P.C.).
3. (1892) L.R. 19 I.A. 90: I.L.R. 19 Cal. 507 (P.C.).
4. (1908) I.L.R. 31 Mad. 458.
5. (1917) 34 M.L.J. 177.
6. (1915) I.L.R. 39 Mad. 915.
7. (1856) 6 M.I.A. 393.
8. (1918) 36 M.L.J. 29: I.L.R. 42 Mad. 185 (F.B.).
9. (1927) 54 M.L.J. 412.

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within the principle of the Full Bench decision. Thiruvenkatachariar, J., was more explicit and recognised the power of the guardian to contract loans without charging the estate, for *necessary purposes* the term to be understood as comprising 'all that is necessary to meet the wants of the minor and of other members of his family who have claims either against him personally or against his estate'. In *Meenakshisundaram* v. *Ranga Aiyangar*[1], the Full Bench decision was again followed without question and a decree against the estate was rendered on a promissory note. The learned Judges referred with approval to the rule in the form stated by Tiruvenkatachariar, J., in the case last cited, observing that that learned Judge had correctly understood the effect of the Full Bench decision. More recently there has been another Full Bench decision reported in *Satyanarayana* v. *Mallayya*[2], in which the liability of a minor's estate on a promissory note executed by the guardian came up once again for consideration. Ramesam, J., reviewed the relevant decisions bearing upon the point; and referring in particular to the earlier ruling in *Ramajogayya* v. *Jagannadham*[3], he said that that decision had always been followed in this Court as settling the law and that nothing had happened since to justify a departure from it. He accepted the statement of law by Curgenven, J., in *Zamindar of Polavaram* v. *Maharaja of Pittapuram*[4], to the effect that any liability to which the minor would be subject under the Hindu law is not the less a liability because it was incurred by a guardian on his behalf. That he understood the earlier Full Bench decisions in the sense in which Tiruvenkatachariar, J., understood them is clear from his observation:

"That in no transaction entered into by a guardian on behalf of a minor can the opposite party succeed, if challenged, without establishing some fact such as that the transaction was for the benefit of the minor or some such other fact."

The learned Judge had obviously in mind the rule in *Hunoomanpersaud's case*[5] as governing the question. This Full Bench decision has very recently been followed in *Seetharamayya*

1. (1931) 35 L.W. 397.
2. (1934) 68 M.L.J. 540: I.L.R. 58 Mad. 735 (F.B.).
3. (1918) 36 M.L.J. 29: I.L.R. 42 Mad. 185 (F.B.).
4. (1930) 60 M.L.J. 56: I.L.R. 54 Mad. 163.
5. (1856) 6 M.I.A. 393.

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Garu v. *Sathiah*[1], to which one of us was a party. In the face of such overwhelming authority which clearly binds us, only one conclusion is possible, namely, that *Hunoomanpersaud's case*[2] contains the true test for deciding the binding character even of a simple loan. We may also perhaps add that justice and equity regarded both from the point of view of the minor, and the lender, are in consonance with the view which has been all along accepted in this Court. The statement of the law in Trevelyan's book on which Venkataramana Rao, J., has relied, merely purports to state the effect of the cases mentioned in the footnote, without noticing the course of decisions in this Presidency interpreting the Privy Council decisions. This is a serious omission which is sufficient in itself, to deprive the statement of real value, so far at any rate as this Court is concerned. The Patna High Court also seems to take the same view of the powers of a guardian, see *Suchit Chaudhuri* v. *Harnandan Singh*[3]. As I have said in *Ramanathan Chettiar* v. *Palaniappa Chettiar*[4]:

> "It is difficult to appreciate an argument which denies to a guardian a power to contract a simple debt while conceding to him in identical circumstances a power to charge or even sell the estate in spite of the greater strictness with which the Hindu law regards transactions affecting immovable properties."

In this proposition an answer was attempted. A sale or a mortgage it was said affects that portion only of the minor's estate which is involved in the particular transaction whereas a simple loan might endanger the entire estate by reason of the possibility of a limitless expansion by way of accumulating interest. Even if this is a sound proposition, which we doubt, there is no reason why it should not equally apply to other limited owners whose position is analogous to that of the guardian. Such is not however the case. The evil if any is due not to the honest creditor who lends the money, but to the irresponsible guardian who negligently omits to take prompt steps to repay it. In this connection it is not to be forgotten that the creditor has to make out a necessity not merely for the loan advanced but also for the rate of interest charged.

A trustee or an executor stands in a different position and to him the principle of the English law which prohibits him from binding the minor by a personal covenant are rightly

1. (1938) M.W.N. 677.
2. (1856) 6 M.I.A. 393.
3. (1932) I.L.R. 12 Pat. 112.
4. (1938) 49 L.W. 132.

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applied, see *Srishchandra Nandi* v. *Sudhirkrishna Banerji*[1]. To them however no less to the guardian the doctrine of subrogation is applicable. This doctrine is to be invoked in cases where there is no direct contractual liability enforceable against the estate. Where the trustee or the executor does not sell or charge but merely contracts or covenants, the effect of the transaction is that it binds him personally and not the estate and consequently there is no direct recourse against the estate available to the creditor. But the law goes to this extent to help him, that if the money is utilised for the benefit of the estate, he will be entitled to such rights of reimbursement, as the borrower himself may have out of it.

It is necessary to sound a note of caution against the error of thinking that the promissory note evidences a contract binding on the minor by force of the instrument itself. The liability does not arise on the instrument, but on the debt evidenced by it, and is enforced against the estate, not on account of the fiction that the contract of the guardian is the contract of the minor, but on account of the substantive principle of the personal law of the minor which creates the liability. It is scarcely necessary to add that the liability of the estate though personal in the English Law sense of the word, is not personal in the sense that the person of the minor even after majority can be arrested in execution. A personal liability arising out of the contract of the guardian is a liability of the minor's estate only.

Coming to the facts of the present case the lower appellate Court has definitely found that out of the three promissory notes which formed the consideration for the note sued on, one only, namely, Ex. A-1 which was for a sum of Rs. 1,000 had been executed by the mother of the minor first respondent for purposes binding on the latter. That is a finding of fact which cannot be, and has not been challenged before us, and is enough in our view of the law to sustain the decree passed by the District Munsif. It is true that that promissory note was executed by the mother and by her agent signing their names without purporting to do so on behalf of the minor. But that is not a material defect. For the circumstances proved in the case, taken along with the recital that the money was borrowed for family and pannai, etc., expenses are sufficient to

1. (1931) I.L.R. 59 Cal. 216.

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support the finding of the learned Subordinate Judge that the promissory note was executed by the mother not in her personal capacity but in her capacity as a guardian acting for the minor. The intention of the makers must have been to exclude the personal liability of the guardian and her agent, and leave the minor's estate alone liable. This intention can be properly inferred, according to *Satyanarayana* v. *Mallayya*[1], on a consideration of all the surrounding circumstances which is precisely what the Subordinate Judge has done, and we can find no error of law in it. Nor is there anything in the pleadings which prevents the appellant who is the payee under the note, from relying on the Hindu law liability of the minor. The plaint has been framed in such a way as to raise the liability of the minor on the consideration, that is, the debt, which is an obligation different from, and external to the note, though arising out of it under the personal law. There is therefore no valid objection to the appellant's claim.

There is one more argument of the respondents' counsel which may be briefly noticed. He contended that there was no proof that the money advanced under Ex. A-1 had been utilized for the benefit of the estate. Assuming that there is no such proof, still it is difficult to appreciate the argument. It is settled that a *bona fide* lender is under no obligation to see to the application of the money. As observed by the Judicial Committee in *Hunoomanpersaud's case*[2]:

> "The purposes for which a loan is wanted are often future, as regards the actual application, and a lender can rarely have, unless he enters on the management, the means of controlling and directing the actual application. Their Lordships do not think that a *bona fide* creditor should suffer when he has acted honestly and with due caution, but is himself deceived."

Proof of actual application will be necessary only if the transaction is to be tested from the point of view of *necessaries* under the Contract Act and not if it is to be decided on the rule of Hindu law. If a different rule has been enunciated in *Maharana Shri Ranmalsingji* v. *Vadilal Vakhatchand*[3], or in any other case, we must express our inability to accept it as correct.

On the law to be applied to the facts found in this case, the appellant is entitled to succeed. The appeal is accordingly allowed, the judgment of Venkataramana Rao, J., is set aside and

1. (1934) 68 M.L.J. 540: I.L.R. 58 Mad. 735 (F.B.).
2. (1856) 6 M.I.A. 393.
3. (1894) I.L.R. 20 Bom. 61.

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the decree of the District Munsif restored with costs throughout. The first respondent has filed an application claiming to be an agriculturist and praying for the benefit of the Madras Agriculturists' Debtors Relief Act (IV of 1938). This petition will be referred to the District Munsif of Palani for enquiry and disposal according to law.

K. C. Appeal allowed.

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VARADACHARIAR, MR. JUSTICE LAKSHMANA RAO AND MR. JUSTICE GENTLE.

The Dharapuram Janopakara Nidhi, Limited, by its present Secretary A. Adisesha Aiyar .. *Appellant** (*Plaintiff*)

v.

K. Lakshminarayana Chettiar .. *Respondent* (*Defendant*).

F.B.

Dharapuram Janopakara Nidhi, Ltd. v. Lakshminarayana Chettiar.

Adverse possession—Possession of stranger without title deeds for more than 12 years—Attachment in execution of a decree against the person with title—If interrupts the adverse possession of stranger—Civil Procedure Code, O. 21, r. 60—Order dismissing claim—If final in the absence of suit under r. 63—Suit under r. 63 in its nature declaratory—Discretion of Court—Exercise of where right barred by limitation.

When in November, 1929, the suit properties were attached by the appellant in execution of a decree of 1917, the respondent preferred a claim which was allowed on the ground that he had been in possession of the properties in his own right since 1911. The executing Court declined to go into the question of title. The suit was filed in November, 1931, under O. 21, r. 63, Civil Procedure Code, to establish the right to bring the properties to sale. It was found that the judgment-debtor had agreed to sell the properties to the respondent, received the consideration and put him in possession in 1911 and the respondent had ever since continued in possession though there was no registered sale deed. The appellant relied on proceedings in a claim petition by the respondent in an attachment in execution in 1917 by another decree-holder of the same judgment-debtor, as interrupting the continuous running of the period of adverse possession in favour of the respondent. That claim petition was dismissed on 9th July, 1917 and the properties were sold in execution. The sale was set aside on objections raised by judgment-debtor and the decree of the third party was otherwise satisfied on 10th August, 1918 and it became unnecessary to take any further proceedings in execution. It was contended by the appellant that as no suit was filed by the respondent within a year of the dismissal of the claim to set aside the order he is not entitled to rely on any possession prior to 9th July, 1917, in support of the plea of adverse possession. In the second appeal Horwill, J., confirmed the decisions of the lower Courts dismissing the suit. On Letters Patent Appeal,

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Held, the possession of a stranger is not affected or disturbed by an attachment. Case law reviewed and discussed.

The finality of the claim order cannot be invoked even by the particular decree-holder who was a party to the claim order and in respect of the very decree which was then under execution, unless he was proceeding to bring the properties to sale in pursuance of that very attachment.

Najimunnessa Bibi v. *Nacharuddin Sardar*, (1923) I.L.R. 51 Cal. 548, followed.

Velayuthan v. *Lakshmana*, (1885) I.L.R. 8 Mad. 506 and *Aisamma* v. *Moideen Kunhi Behari*, (1923) 45 M.L.J. 690: I.L.R. 47 Mad. 160, not followed.

Venkata Rangacharyulu Ayyavarlam Garu v. *Jammi Turanga Rao*, (1938) 2 M L.J. 430, explained and distinguished.

A suit under O. 21, r. 63 is in form and substance a declaratory suit and it will be an unreasonable exercise of discretion by the Court to make a declaration of the decree-holder's right to attach if the period of limitation of 12 years had expired between the date of the attachment and the date of the suit unless the property had already been sold in time.

Seetharami Reddi v. *Venku Reddi*, (1901) 11 M.L.J. 344 and *Ranganatha Aiyar* v. *Srinivasa Aiyangar*, (1925) 49 M.L.J. 656, followed.

Vasudeo Atmaram Joshi v. *Eknath Balkrishna Thite*, (1910) I.L.R. 35 Bom. 79 and *Pandiyan Pillai* v. *Vellayappa Rowther*, (1917) 33 M.L.J. 316, not followed.

Appeal under cl. 15 of the Letters Patent against the judgment and decree of the Hon'ble Mr. Justice Horwill dated 2nd September, 1936, in Second Appeal No. 1163 of 1934 preferred to the High Court against the decree of the Court of the Subordinate Judge (Additional) of Coimbatore in A. S. No. 32 of 1934 (A. S. No. 237 of 1933, District Court) preferred against the decree of the Court of the District Munsif of Dharapuram in O. S. No. 601 of 1931.

T. M. Krishnaswami Aiyar and *S. S. Ramachandra Aiyar* for Appellant.

V. V. Srinivasa Aiyangar, V. V. Ramadurai, V. Govindarajachari, T. V. Bhagavat and *R. Muthialuswami* for Respondent.

The Court delivered the following

JUDGMENTS. *Varadachariar, J.*—This appeal arises out of a suit instituted by the appellant, under O. 21, r. 63, Civil Procedure Code, to establish his right to attach and bring the suit properties to sale in execution of a decree for money which he had obtained in 1917 against one Syed Abdul Razak Saheb (since deceased). When the suit properties were attached in execution of that decree in November, 1929, the respondent preferred a claim, which was allowed on the ground that he had been in possession of these properties in his own right since

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1911; the executing Court declined to go into the question of title. In this suit which was instituted in consequence of that order, the lower appellate Court has also found that though the properties in dispute belonged at one time to Syed Abdul Razak Saheb, he had agreed to sell them to the respondent, received the consideration and put him in possession in 1911 and that the respondent has ever since continued in possession. On this finding it would have followed that though title under the sale did not pass to the respondent, because of the absence of a registered sale deed, he had acquired a title by adverse possession many years before the date of the attachment.

To avoid the above result, the appellant relied on certain proceedings that took place in 1917, between the respondent and another decree-holder, when the latter attached these properties in execution of a decree that he had obtained against Syed Abdul Razak. A claim petition then filed by the present respondent was dismissed on 9th July, 1917; and, it has been contended that as no suit was filed by the respondent within a year of the date of that order to set it aside, he is not entitled to rely on any possession that he might have had prior to 9th July, 1917, in support of his plea of adverse possession. To complete the narrative and to assess the value of the above contention, I may add that though, on the dismissal of the claim petition in 1917, the properties were sold in execution of the third party's decree, that sale was set aside on objections raised by the judgment-debtor and the decree of the third party was otherwise satisfied on 10th August, 1918, so that it became unnecessary to take any further proceedings in execution of that decree.

Both the lower Courts dismissed the appellant's suit and their decision was confirmed in second appeal by Horwill, J., who however granted the appellant leave to appeal under cl. 15 of the Letters Patent. In view of the state of the authorities bearing on some of the questions arising in the appeal, the case has been directed to be posted before a Bench of three judges.

The learned Counsel for the appellant has, on the facts above stated, raised two contentions (i) that the effect of the attachment of the suit properties by the stranger-decree-holder in 1917 was to *interrupt* the adverse possession of the respondent and that as that attachment must be deemed to have subsisted till 10th August, 1918, when that decree was satisfied,

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the respondent could acquire a prescriptive title only by possession for 12 years subsequent to 10th August, 1918; (ii) that, in any event, the effect of the order dated 9th July, 1917, dismissing the respondent's claim petition was to estop him from pleading his prior possession and to treat the possession as being in the judgment-debtor and that unless the respondent proved a subsequent entry and continuous possession after that entry for a period of 12 years, he could not claim a prescriptive title. A further difficulty arose in the appellant's way on account of the fact that this suit was instituted only in November, 1931. It will be noticed that even if, in accordance with the above contentions of the appellant, the respondent should be called upon to prove 12 years' possession from 10th August, 1918, that period would have expired by 11th August, 1930, that is, more than a year before the institution of this suit. The appellant had therefore to advance the further contention (No. iii) that in a claim suit, the material date with reference to which the Court has to determine the rights of the parties is the date of the attachment, which in this case was 8th November, 1929.

The first contention seems to me clearly untenable and no authority has been cited in support of it. It was held so long ago as in *Krishnama Rajah* v. *Narayanaswami Rajah*[1] and *Narayanrav Damodar Dabholkar* v. *Balkrishna Mahadev Gadre*[2], that an attachment in execution of a decree does not dispossess the party in possession; and in *Seetharami Reddi* v. *Venku Reddi*[3] and *Ranganatha Aiyar* v. *Srinivasa Aiyangar*[4], this Court has expressly laid down that an attachment does not interrupt the adverse possession of a stranger holding adversely to the judgment-debtor. As explained in *Ranganatha Aiyar* v. *Srinivasa Aiyangar*[4], this proposition has not been dissented from in *Pandiyan Pillai* v. *Vellayappa Rowther*[5]. Nor can it be maintained that *Harishankar Jebhai* v. *Naran Karsan*[6], *Vasudeo Atmaram Joshi* v. *Eknath Balkrishna Thite*[7], *Najimunnessa Bibi* v. *Nacharuddin Sardar*[8] and *Venkata Rangacharyulu Ayyavarlam Garu* v. *Jammi Turanga Rao*[9], which were relied on by appellant's learned Counsel in support of his third contention,

1. (1869) 4 M.H.C.R. 281.
2. (1880) I.L.R. 4 Bom. 529 (F.B.).
3. (1901) 11 M.L.J. 344.
4. (1925) 49 M.L.J. 656.
5. (1917) 33 M.L.J. 316.
6. (1893) I.L.R. 18 Bom. 260.
7. (1910) I.L.R. 35 Bom. 79.
8. (1923) I.L.R. 51 Cal. 548.
9. (1938) 2 M.L.J. 430.

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lay down any proposition corresponding to his first contention. It seems to me that in view of the provisions of the Civil Procedure Code relating to the effect of an attachment and of the form (No. 24) in Appendix E to the Code, it is not possible to hold that the possession of a stranger is affected or disturbed by an attachment. The learned Counsel relied on the familiar use of the expression "*custodia legis*" when speaking of the effect of an attachment; it does not seem to me right to rely on this expression as justifying the view that the property attached, even if in the possession of a stranger, passes into the *possession* of the Court. At best, the expression can only signify some kind of *control* of the Court, over further dealings with the property by the judgment-debtor.

Reliance was placed on certain observations in *Haranchandra Chakravarti* v. *Joy Chandi*[1], *Sivaswami Odayar* v. *Subramania Aiyar*[2] and *Mahasukh Jhaverdas* v. *Valibhai Fatubhai*[3], where the Court had to determine the scope of S. 52 of the Provincial Insolvency Act. I see no reason to quarrel with the view there taken that that section is not confined to movable property'. The observation in *Mahasukh Jhaverdas* v. *Valibhai Fatubhai*[3], is no doubt couched in terms which suit the appellant's contention; but in *Sivaswami Odayar* v. *Subramania Aiyar*[2], Waller, J., emphasised the unreasonableness of treating an attachment as putting the immovable property attached in the *possession* of the Court. The question of adverse possession did not arise in any of these cases and I am not prepared to take observations contained in them out of their context and base on them a proposition which the learned Judges had no occasion to think of. In support of the argument that an attachment should not be treated as having no greater effect than preventing alienation by the judgment-debtor, reliance was placed on certain observations in *Suraj Bunsi Koer* v. *Sheo Proshad Singh*[4], *Sankaralinga Mudaliar* v. *Official Receiver of Tinnevelly*[5] and *Anantapadmanabhaswami* v. *Official Receiver of Secunderabad*[6]. These at best only show that so far as the

1. (1929) I.L.R. 57 Cal. 122.
2. (1931) 62 M.L.J. 68: I.L.R. 55 Mad. 316.
3. A.I.R. 1928 Bom. 177 (1).
4. (1879) L. R. 6 I.A. 88: I.L.R. 5 Cal. 148 (P.C.).
5. (1925) 49 M.L.J. 616.
6. (1933) 64 M.L.J. 562: L.R. 60 I.A. 167: I.L.R. 56 Mad. 405 (P.C.).

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attaching creditor is concerned he may, by reason of the attachment be able to defeat survivorship to the extent necessary to satisfy his claim. Even the reservation made in *Anantapadmanabhaswami* v. *Official Receiver of Secunderabad*[1], only suggests the possibility of a charge or lien in favour of the attaching creditor and lends no support to the theory of dispossession of a stranger or interruption of his adverse possession.

The analogy of cases decided with reference to the effect of an attachment under S. 146 of the Criminal Procedure Code, *Sarat Chandra* v. *Bibhabati Debi*[2] and *Ramaswami Aiyar* v. *Muthuswami Aiyar*[3], only helps to emphasise the distinction between an attachment under that section and an attachment in execution of a Civil Court's decree. This distinction has been clearly pointed out in *Gopala Aiyar* v. *Krishnaswami Aiyar*[4]. A Magistrate acting under S. 146 of the Criminal Procedure Code takes the property out of the possession of the disputants and the subsequent possession of the Receiver is in law treated as possession on behalf of the *true owner* and not of the party previously in possession without title. But an attachment in execution does not prevent the judgment-debtor and much less a third party from continuing to enjoy the property; there is accordingly no occasion for the application of the rules relating to "constructive possession". The same consideration furnishes the ground of distinction between cases relating to *vis major* and the present. In the former case, the land has *ex hypothesi* become incapable of actual possession; and the doctrine of constructive possession can be invoked only by the true owner and not by a person who has to rely on adverse possession. *Secretary of State for India* v. *Krishnamoni Gupta*[5].

I may here refer to the indication afforded by Art. 137 of the Limitation Act. Read with S. 3 of the Act, it implies that a person who purchases in Court auction property which at the time of the sale was not in the possession of a judgment-debtor must sue for possession within 12 years from the date when the judgment-debtor was first entitled to possession. If the appellant's argument were well founded, the position ought to be

1. (1933) 64 M.L.J. 562: L.R. 60 I.A. 167: I.L.R. 56 Mad. 405 (P.C.).
2. (1921) 34 Cal. L.J. 302.
3. (1906) 16 M.L.J. 541: I.L.R. 30 Mad. 12.
4. (1919) 54 I.C. 473.
5. (1902) L.R. 29 I.A. 104: I.L.R. 29 Cal. 518 (P.C.).

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different in ceses in which there has been an attachment prior to the Court sale. If the Court were to be regarded as being in possession of the property, no suit by the purchaser would be necessary at all. It would be sufficient if he applied to the Court to hand over possession to him. Further, the period of the stranger's possession would have to be reckoned in that view only up to the date of the attachment and not up to the date of the commencement of the suit. This inconsistency might perhaps be obviated by assuming that Art. 137 was intended to apply only to cases in which the Court sale has taken place without an antecedent attachment, as, for instance, in execution of a mortgage decree. But I see no warrant for so limiting Art. 137 and I am not aware of any case in which it has been so limited.

In support of the second contention above set out, the learned Counsel for the appellant relied on *Velayuthan* v. *Lakshmana*[1] and *Aisamma* v. *Moideen Kunhi Behari*[2]. In the first of these cases, which was followed in the second, it was observed that when a claim petition is dismissed and no suit questioning that order is instituted within a year, the dismissal "amounts to a summary declaration of want of title in the objector and such declaration becomes equivalent to a final adjudication against his right". Where the claimant had set up that he had been in possession, the learned judges construed the order of dismissal to amount to "an adjudication that the land was not in the applicant's possession" and in their opinion it followed that in a suit by the Court auction-purchaser it would not be open to the claimant to assert, in direct opposition to that declaration, that he had been in possession. I may at the outset observe that this line of cases is of no avail to the appellant in the present case, for two reasons. The conclusiveness of the order dismissing a claim petition can be availed of only by persons purchasing in a sale held in pursuance of the attachment in connection with which the claim was preferred. Even if it could be assumed that the adjudication would be final as between the particular decree-holder and the claimant or at least in proceedings subsequently taken to enforce that particular decree, the position in the present case is different. As already pointed out, the claim

1. (1885) I.L.R. 8 Mad. 506.
2. (1923) 45 M.L.J. 690: I.L.R. 47 Mad. 160.

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order of 9th July, 1917, was passed not in connection with the appellant's decree or in any proceedings to which he was a party; and even as regards the third party's decree then under execution, the decree was otherwise satisfied, making it unnecessary for the claimant to take any steps to vindicate his rights. The fact that that decree was satisfied only after the expiry of a year from the date of the claim order cannot, in my opinion, make any difference for the purpose of the present case. If the claimant allowed one year's term to expire, he would no doubt be running a risk, in that the decree-holder who had originally attached the property might proceed to bring the property to sale in pursuance of his attachment. If however that decree is not for any reason executed subsequently, there is no justification for imposing a penalty on the claimant for not filing a suit within a year of the dismissal of his claim. I may add that the weight of authority is in favour of the view that the finality of the claim order cannot be invoked even by the particular decree-holder who was a party to the claim order and in respect of the very decree which was then under execution, unless he was proceeding to bring the properties to sale in pursuance of that very attachment. (See *Najimunnessa Bibi* v. *Nacharuddin Sardar*[1].) It also seems to me difficult to support the observations in *Velayuthan* v. *Lakshmana*[2] in their entirety. For one thing, it does not seem to me right to interpret every order dismissing a claim petition as involving an adjudication that the claimant was not in possession. The present case itself affords an illustration: because, the order of 9th July, 1917, was not based on any finding that the claimant was not in possession but only proceeded on the ground that the claim petition had been unreasonably delayed and was filed on the very day on which the sale was to take place. There is no doubt a reference to the absence of a sale-deed in the claimant's favour. That statement seems to have been added only to justify the course adopted by the Court, namely, refusal to investigate the claim. Even otherwise, the reference to the absence of a sale-deed cannot be construed as implying a finding against the claimant's *possession*. Mr. Krishnaswami Aiyar contended that an order dismissing a claim petition must be presumed to have been passed only under O. 21, r. 60 of the Civil Procedure Code, that is, on the footing that the property was in the possession of the

1. (1923) I.L.R. 51 Cal. 548. 2. (1885) I.L.R. 8 Mad. 506.

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judgment-debtor or in the possession of some other person in trust for him or as his tenant. I am not able to concur in this argument; because, it ignores the proviso to r. 58, cl. (1) empowering the Court to dismiss the application without investigation. Even in cases in which the Court may investigate the claim, the dismissal of the claim need not necessarily be on the ground that the judgment-debtor is in possession. If the Court found that the claimant was not in possession, it must equally dismiss the petition. In such a case it might as well be that a third party and not the judgment-debtor was in possession. The principle of *constructive* adjudication must be applied with great caution to these summary orders in execution and I see no justification for reading into a claim order anything more than is contained in it or is at least necessarily implied in it.

Even in cases in which a claim petition is dismissed on a finding that the claimant was not in possession, I find it difficult to go the length of holding that in the absence of a suit by him within one year of the order, he must be *finally* debarred from relying upon proof of prior possession when the ultimate purchaser sues for possession. The observations in *Velayuthan* v. *Lakshmana*[1] do not take sufficient notice of the difference between a proceeding under r. 60 or 61 of O. 21, Civil Procedure Code and a suit under r. 63, as regards the scope of the enquiry contemplated. To take a case in which a claim is dismissed on a finding of absence of possession in the claimant, this finding is *ex hypothesi* capable of being displaced by a suit within one year. To that extent it is not final. But if the claimant had by that time no completed title but only a possession which was on the way to mature into a prescriptive title, what has he to gain by the institution of a suit under O. 21, r. 63? Suppose in such a suit he satisfies the Court that the proper order as to the absence of possession in himself was wrong; if nevertheless he had not by that time perfected his prescriptive title, his suit is bound to fail. The decree-holder would be still entitled to treat the property as the property of the judgment-debtor and bring it to sale. What then is the purpose in insisting upon the claimant instituting a suit which is bound to be dismissed? These considerations incline me to think that the omission to file a suit questioning the finding as to possession

1. (1885) I.L.R. 8 Mad. 506.

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will only justify that finding being treated as *prima facie* evidence of the absence of possession in the subsequent suit of the purchaser for possession. It is difficult to justify the view that the omission to file a purposeless suit should deprive the claimant of the benefit of his prior possession even if he is able to prove it conclusively.

In *Venkata Rangacharyulu Ayyavarlam Garu* v. *Jammi Turanga Rao*[1], the learned Judges interpreted the order dismissing the claim petition as involving an adjudication that the possession if any held by the claimant was on behalf of the judgment-debtor. If the terms of the order in that particular case justified that interpretation, it would be a different matter. But if it was meant to imply that every order dismissing a claim petition involved an adjudication that the judgment-debtor was in possession on that date, I am with all respect unable to concur in that view. Where, as in the present case, the claim petition is dismissed on the ground of delay, it is impossible to justify any such interpretation.

In the view that the appellant fails in respect of contentions 1 and 2 set out above, the third contention does not call for a decision in this case, because, even if the rights of parties are to be adjudicated as they stood on 8th November, 1929, the respondent would have acquired a prescriptive title by that time, having been in continuous adverse possession from 1911. But as the cases bearing on this contention have been referred to before us, I think it right to make a few observations on the point. It may in a sense be right to state that the principal question for determination in a suit under O. 21, r. 63, Civil Procedure Code, is whether or not the order on the claim petition was right and in that sense the Court is in such a suit called upon to deal with the rights of parties as they stood on the date of the attachment. But the suit under O. 21, r. 63 is in form and in substance a declaratory suit and it seems to me that it will be an unreasonable exercise of discretion by the Court to make a declaration, in such a case, of the decree-holder's right to attach if the period of limitation of 12 years had expired between the date of the attachment and the date of the institution of the suit unless the property had already been sold in time. The suit is often but a step to enable

1. (1938) 2 M.L.J. 430.

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the decree-holder to bring the property to sale; if by reason of the extinction of the judgment-debtor's title before the sale, there would be nothing to be sold, a declaration in the decree-holder's favour in the suit under O. 21, r. 63 will not only be futile but sometime even be mischievous, as it may mislead an unwary purchaser into thinking that he was buying a subsisting interest. In this view, I am inclined to agree with *Seetharami Reddi* v. *Venku Reddi*[1] and *Ranganatha Aiyar* v. *Srinivasa Aiyangar*[2] in preference to *Vasudeo Atmaram Joshi* v. *Eknath Balkrishna Thite*[3] and *Pandiyan Pillai* v. *Vellayappa Rowther*[4]. The appeal fails and is dismissed with costs.

Lakshmana Rao, J. Gentle, J.

Lakshmana Rao, J.:—I agree.

Gentle, J.:—I agree.

K. S. *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Madras.]

PRESENT:—LORD ROMER, LORD PORTER AND SIR GEORGE RANKIN.

Ulagalum Perumal Sethurayar .. *Appellant**

v.

Rani Subbulakshmi Nachiar .. *Respondent.*

P.C.

Ulagalum Perumal Sethurayar v. Rani Subbulakshmi Nachiar.

Hindu Law—Mitakshara—Impartible estate—Joint family—Alienation prior to Madras Act II of 1902—Powers of holder—Exercise in favour of a member of family—Validity—Estate in hands of such grantee—If becomes separate property—Death of grantee after vesting of estate—Succession—Right of widow as against half brother claiming by survivorship.

A Hindu zemindar governed by the Mitakshara held an impartible ancestral estate belonging to the joint family. He had a son by his first wife who was dead and his second wife was *enceinte*. Shortly before the Madras Impartible Estates Act (II of 1902) came into force, in exercise of his power of alienation, and to exclude the eldest son from succession, the zemindar settled the whole property on himself for life and subject there to granted it absolutely to the child with whom his second wife was then *enceinte*, if such child should be born alive and a male. The transfer was voluntary. The eldest son died in 1903. The second wife died in 1904 and the zemindar married a third wife who bore him a son in 1906. In 1907 the zemindar died and his son by the second wife succeeded to the zemindari. The second son died in 1929 and his widow brought the action to establish her right to succeed to the zemindari as against the half-brother of her husband. The Subordinate Judge held in her favour and the High Court substantially affirmed the decision. On appeal,

Held, the right of unfettered alienation of the holder of an impartible estate affirmed in *Rani Sartaj Kuari* v. *Rani Deoraj Kuari*, (1888) L.R.

1. (1901) 11 M.L.J. 344. 2. (1925) 49 M.L.J. 656.
3. (1910) I.L.R. 35 Bom. 79. 4. (1917) 33 M.L.J. 316.

* P. C. Appeal No. 97 of 1936. 24th February, 1939.

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15 I.A. 51: I.L.R. 10 All. 272 (P.C.), may when exercised in favour of a member of the family produce the result of making the property, the separate property of an individual member. The fact that the transfer was voluntary, not for valuable consideration, and of the whole estate, cannot prevent the second son taking it as separate property. The property descended to the second son's widow in accordance with the rules governing succession to separate property.

Appeal from a decision of the High Court, Madras (Ramesam and Stone, JJ.), dated 19th March, 1935, modifying a decree of the Subordinate Judge, Tinnevelly, dated 23rd April, 1931.

H. D. Cornish for Appellant.—The appellant's basic contention can be put alternatively. It was not in the settlor's power legally to confer an advantage on one member of the family thereby terminating the right to the estate enjoyed by other members; alternatively, the second son could not lawfully take the estate as self-acquired property. A distinction must be drawn for this purpose between alienation to a stranger and alienation to a member of the family. In the former case the rights of the family are admittedly defeated. (Counsel referred to *Konammal* v. *Annadana Jadaya Gounder*[1], *Shiba Prasad Singh* v. *Rani Prayag Kumari Debi*[2] and *Collector of Gorakhpur* v. *Ram Sundar Mal*[3].)

Some act of surrender by the eldest son was essential to the efficacy of what the settlor has purported to do here, for it cannot be held lawful for him to effect severance as between his sons when he has no right to partition the estate. The deed of settlement could not prevent the estate from continuing to be the ancestral family property or affect the rights to succession by survivorship.

A. M. Dunne, K.C. and *J. Chinna Durai* for Respondent.—There is nothing inconsistent between the deed of settlement and the absolute power of alienation which a zemindar was held to have in *Rani Sartaj Kuari* v. *Rani Deoraj Kuari*[4]. The deed had the effect of vesting the property in Minakshi Sundara as self-acquired property. How, if the settlor had the power to exclude his eldest son from the succession, can it be contended that he had no such power with respect to the rights of the appellant who was not born, and whose mother, moreover, was not, when the settlement was made, even the contemplated wife of the settlor? Counsel referred to the Mitakshara, Ch. I, S. IV, Verse 28.

H. D. Cornish replied.

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1. (1927) 54 M.L.J. 504: L.R. 55 I.A. 114: I.L.R. 51 Mad. 189 (P.C.).
2. (1932) 63 M.L.J. 196: L.R. 59 I.A. 331: I.L.R. 59 Cal. 1399 (P.C.).
3. (1934) 67 M.L.J. 274: L.R. 61 I.A. 286: I.L.R. 56 All. 468 (P.C.).
4. (1888) L.R. 15 I.A. 51: I.L.R. 10 All. 272 (P.C.).

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24th February, 1939. Their Lordships' judgment was delivered by

SIR GEORGE RANKIN.—This appeal concerns the succession to the impartible estate of Urkad in the district of Tinnevelly, and is brought from a decree dated the 19th March, 1935, of the High Court of Madras affirming, upon the question now in dispute, the decree (23rd April, 1931), of the Principal Subordinate Judge of Tinnevelly. Both Courts in India have held that, upon the death in 1929 of Minakshi Sundara, the estate of Urkad devolved upon his widow Rani Subbulakshmi Nachiar who was plaintiff in the suit and is respondent upon this appeal. The appellant is Ulagalum Perumal, the younger half-brother of Minakshi Sundara, who was the first defendant in the suit. It is not now contended that the appellant and Minakshi Sundara were divided. The Trial Court held that there had been a partition of the partible property of the joint family, but this finding was reversed by the High Court and is not appealed from.

In 1902 the zemindar was S. Kotilinga Sethurayar (hereinafter called the settlor) a Hindu governed by the Mitakshara. He held the impartible estate as ancestral property belonging to the joint family, of which he was a member, and not as his separate property. His first wife had died, but he had married again. By his first wife he had a son, K. Kotilinga Sethurayar. His second wife was *enceinte*. Being displeased with his son he desired to defeat his son's prospect of succession to the estate by making use of the power of alienation recognised as belonging to owners of impartible estates by the decision of this Board in the case of *Rani Sartaj Kuari* v. *Rani Deoraj Kuari*[1]. His power of alienation was however in danger of becoming restricted by legislation so as to become no greater than the power of a managing member of a joint Hindu family to alienate ancestral property. A few days before the 2nd June, 1902, when the Madras Impartible Estates Act, 1902 (Madras Act II of 1902), came into force, he executed a deed of settlement dated 29th May, 1902, in respect of the impartible zemindari. By that deed he declared that he was dissatisfied with the character and conduct of his son and was desirous that the son should not succeed to the zemindari. He settled the zemindari

1. (1888) L.R. 15 I.A. 51: I.L.R. 10 All. 272 (P.C.).

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upon himself for life and subject thereto granted it absolutely to the child with whom his second wife, Thanga Pandichi, was then *enceinte*, if such child should be born alive and a male. If the child should not be born alive and a male, or, being born alive and a male, should die before the settlor without leaving male issue, the zemindari was to go to his wife Thanga Pandichi absolutely. His son was given a maintenance allowance and a house. The settlor appointed himself trustee of the settled property.

Thereafter on the 13th August, 1902, Minakhi Sundara was born of the second wife Thanga Pandichi. In 1903 the settlor's first-born son, K. Kotilinga Sethurayar, died. In 1904 the second wife died, and the settlor having married a third time the appellant Ulagalum Perumal was born to him by his third wife in June 1906. On the 7th January, 1907, the settlor died and Minakshi Sundara succeeded to the zemindari, the estate being managed on his behalf by the Court of Wards till 1923, when he came of age. He died in July, 1929, and, as the Collector proposed to recognise his half-brother, the appellant, as entitled to succeed to the impartible estate, the widow brought her suit on the 1st October, 1929, to establish her right to succeed. Her case is that, when in 1902 her husband took a vested interest in the estate by virtue of his father's exercise of his unfettered right of alienation, the estate ceased to be property of the joint Hindu family as truly and completely as if it had been granted to a stranger to the family; accordingly, that the principle of survivorship cannot on his death be applied to carry the estate to the eldest member of the senior branch of the family; and that it descends to her according to the rules which govern succession to separate property.

The High Court was careful to point out that the present case raises no question such as might have arisen had Minakshi Sundara died leaving sons—whether the estate in his hands was ancestral as having come to him from his father in the sense that a son would have taken an interest therein at birth. On this subject there has been much divergence of opinion in India; and it was left unsettled by the judgment of the Board in *Lal Ram Singh* v. *Deputy Commissioner of Partabgarh*[1].

It is clear that Minakshi Sundara did not take his interest under the deed of 1902 under any contract or

1. (1923) 47 M.L.J. 260: L.R. 50 I.A. 265 at 275: I.L.R. 45 All. 596 (P.C.).

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bargain made by him or on his behalf or by any other persons so as to bind him. The settlor was disposing of the estate in full appreciation of his power to alienate, and there is no room for suggestions as to family arrangement or mere relinquishment by the settlor or mere supersession of the eldest son. Indeed, if the settlor's intention be supposed to govern the matter, the provisions of the deed of 1902 indicate, as the High Court notice, an intention that the estate should not continue to be joint family property, as otherwise in certain quite probable events the deed would not effectively exclude the eldest son. In particular, should the son to be born die in the lifetime of his elder brother leaving sons, the elder brother would succeed as senior to any of such sons if the property were to pass by survivorship as joint family property.

The able argument of learned counsel for the appellant was of a far-reaching character. He contended that it was not competent in law for the settlor to advantage one member of the family by terminating the right which other members of the family had in the estate. Or, putting the same matter in another form, that it was not competent for Minakshi Sundara to take the estate as self-acquired property. Learned counsel contended that while an alienation to a stranger would defeat the rights of all the members of the family, the result of an alienation in favour of one member could not in law be to defeat the rights of the other members. For this contention he relied upon decisions of the Board to the effect that, as the right of partition does not exist in the case of an impartible estate, junior members of the family will not be taken to have given up their interest in such an estate or their claim to succeed thereto unless they can be proved to have surrendered it. (*Konammal* v. *Annadana Jadaya Gounder*[1], *Shiba Prasad Singh* v. *Rani Prayag Kumari Debi*[2] and *Collector of Gorakhpur* v. *Ram Sundar Mal*[3].) He argued that the settlor, having no right to partition the estate or to claim as against the eldest son or other members to hold it as his separate property, cannot by an alienation compel a severance between one son and another. In the absence of surrender or relinquishment by a member of his interest, partition, it is said, is the only way by which joint

1. (1927) 54 M.L.J. 504: L.R. 55 I.A. 114: I.L.R. 51 Mad. 189 (P.C.).
2. (1932) 63 M.L.J. 196: L.R. 59 I.A. 331: I.L.R. 59 Cal. 1399 (P.C.).
3. (1934) 67 M.L.J. 274: L.R. 61 I.A. 286: I.L.R. 56 All, 468 (P.C.)

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family property can become the separate property of a member; and this result is contrary to the custom of impartibility.

Their Lordships have given full consideration to this argument but do not consider that it can be sustained. No doubt joint property cannot if governed by a custom of impartibility be converted into separate property by any exercise of the right to call for a partition as the existence of such a right is inconsistent with the custom. But it does not follow that by no other way can the same result be arrived at. Admittedly it can be achieved by surrender or relinquishment. And it would seem that the right of any given person to succeed by survivorship to any given property must depend both upon the person continuing to be a member of the joint family and also upon the property continuing to belong to the family. If the zemindar has a power of alienation which is not limited by legal necessity nor liable to be controlled by any other member of the family, so that he can squander the property or give or sell it to a stranger, thereby defeating the rights of other members, there would not seem to be great force in the reflection that when he transfers to a member of the family he is effecting a result similar to that produced by partition without having the power to compel partition. The status of an individual as a member of a Hindu joint family is in no way inconsistent with his owning separate property; and the right of unfettered alienation affirmed in *Sartaj Kuari's case*[1] may well produce results, when exercised in favour of a member, which are as favourable or more favourable to him than those which partition would have produced. If the property ceases to be the property of the joint family, there is nothing to which the right by survivorship can attach and there is no added difficulty in its becoming the separate property of an individual member. The right of alienation was held to belong to the holder of an impartible estate because the other members of his family, having no right to call for partition, were thought to have no right to control him; if in some cases the result of this doctrine upon the rights of the other members is to defeat them altogether, the right of alienation cannot, in their Lordships' opinion, be limited in other cases merely by reason that the holder had no right to call for partition.

1. (1888) L.R. 15 I.A. 51: I.L.R. 10 All. 272 (P.C.).

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If then there be no rule of law to prevent the settlor from giving or Minakshi Sundara from taking the estate as self-acquired or separate property, it remains to consider whether the interest given to Minakshi Sundara under the deed should be regarded as joint family property and not as his separate property by reason that the transfer to him was voluntary and not for valuable consideration and that the interest transferred was an interest in the whole of the zemindari estate and not only in a part thereof. Assuming without affirming that such considerations might in certain circumstances lead to the conclusion that the property was taken as joint family property, their Lordships cannot in the present case attribute to them any cogency in that respect, in view of the fact that Minakshi Sundara took a vested interest at a time when his elder brother was alive, and under a provision which was intended to defeat the ordinary course of succession to the estate. It so happened that at the time of the settlor's death Minakshi Sundara was his eldest surviving son, but this accident cannot retrospectively affect the operation of the deed of 1902.

In the case of *Raja Ajai Verma* v. *Musammat Vijai Kumari*[1], Raja Fateh Singh, a Hindu governed by the Mitakshara and owner of an impartible estate in the Shahjahanpur district of Agra, had made a will whereby half the estate was left to his eldest son and half to his second son, Vijai Verma. The will was challenged, but the High Court of Allahabad upheld it on appeal. The younger son had died leaving an only daughter, Vijai Kumari. In the view of the High Court she was entitled to succeed to half of the estate, though the Board held on appeal that she was excluded by a custom in this Rajput family which disinherited daughters. The learned Judges of the High Court (Mukerji and Bennet, JJ.), said in their judgment:—

"The 3rd issue is as follows:—'Whether in the case of it being found that the property is impartible and Vijai Verma got a half share in it under his father's Will the property taken by Vijai Verma would descend by way of inheritance to a single male heir by the rule of lineal primogeniture and whether, therefore, Vijai Kumari will be excluded from inheritance?'

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1. (1938) 43 C.W.N. 585 (P.C.).

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"The question raised in this issue is not free from difficulty, and there is no clear decided authority either way. On principle, however, we think the issue ought to be answered in favour of Vijai Kumari.

"The argument on behalf of the defendant is fairly summarised in the issue itself. It is urged that by virtue of family custom the property of the Raja of Pawayan is an impartible estate descendible in a particular way and the mere fact that a portion of it is given away to one of the members of the family will not change the character of the property and make its mode of descent different from the original method. But this argument overlooks the fact that Vijai Verma is not entitled to inherit any portion of the property in suit. He is as much a stranger for the purposes of inheritance as one who has nothing to do with the family. He gets the property by virtue of the 'gift' made by his father in his favour under the Will. It matters little whether the gift is in favour of a stranger or in favour of a person belonging to the same stock as the defendant. The property in the hands of Vijai Verma must be treated as self-acquired property for the purposes of descent to his heirs."

At the hearing before the Board this view was not challenged, and in the judgment delivered on 19th December, 1938, by Sir George Lowndes, it was stated:—

"Assuming as their Lordships do in this judgment, that a moiety of the estate passed by the will of Raja Fateh Singh to Vijai Verma, it is admitted that it would be partible property in his hands and would descend as such on his death."

While their Lordships do not doubt that the High Court of Allahabad rightly held in that case that the property in question, if it passed under the will to Vijai Verma became his self-acquired property, they are not to be taken as affirming that any different result would have ensued had Vijai Verma been the person entitled to inherit. They say nothing here as to family arrangement or the power of a grantor to impose conditions, but otherwise, so far as regards the joint family, they see considerable difficulty in giving different effect to an alienation made under the power declared to exist in *Sartaj Kuari's case*[1] according as the grant be made voluntarily or for consideration, comprises the whole or only part of the estate, is in favour of a member of the family or a stranger, or in favour of the person entitled to succeed or of some other member of the family. They recognise, however, that as between the grantee and his sons questions may arise upon which these considerations, or some of them, may have importance.

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1. (1888) L.R. 15 I.A. 51: I.L.R. 10 All. 272 (P.C.).

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Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors for Appellant: *Mehra & Co.*

Solicitors for Respondent: *Hy. S. L. Polak & Co.*

R. C. C. — *Appeal dismissed.*

K. S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN AND MR. JUSTICE LAKSHMANA RAO.

Chandra Kesavalu Chetty and another .. *Appellants* (Plaintiffs)*

v.

S. P. Perumal Chettiar .. *Respondent.*

Chandra Kesavalu Chetty v. Perumal Chettiar.

Limitation Act (IX of 1908), S. 10—Sale of property—Registered bond containing clause that the portion of sale price retained by vendee to be paid to a minor son of vendor on his attaining majority—Whether constructive trust created—Applicability of Limitation Act, S. 10.

The father of plaintiffs sold in 1911 a house belonging to him to the defendant. The purchase price was fixed at Rs. 2,600 out of which Rs. 800 was left with the vendee on condition that he should keep it until *K*, a minor illegitimate son of the vendor, should attain his majority. The registered document executed by the vendee was as follows: "........ As this sum of Rs. 800 is reserved with me on behalf of the said minor *K*, I shall pay interest of Rs. 7 on the said sum at Rs. 0-14-0 per cent. per mensem from this day forwards, either once a month or once in six months to you in person or to your order, for the maintenance of the said minor and obtain receipt from you. As regards the said principal sum of Rs. 800 the same will be paid to the said *K* as soon as he attains proper age either by myself or by my heirs getting a release deed from him as mentioned in the sale-deed executed to me by you. In default, you shall realise the amount by proceeding against me and my other properties. To this effect I have executed this bond." The father died in 1920 and the illegitimate son was alleged to have disappeared shortly after. In 1930 the plaintiffs the legitimate sons demanded payment of the amount. The defendant repudiated liability, and the plaintiffs filed this suit in *forma pauperis* in 1935. On the question whether the suit was barred by limitation,

Held, that S. 10 of the Indian Limitation Act had no application to what are called constructive 'trusts', more accurately described in the Trusts Act as 'obligations in the nature of a trust' but only to trusts properly so called, as defined in the Trusts Act. Here since the vendor retained the property in the sum of money retained, the transaction was nothing more nor less than a loan of Rs. 8-0 to the defendant, the loan to be discharged by paying *K* on his attaining majority.

Appeal against the decree of the Court of the Principal City Civil Judge, Madras, in O. S. No. 774 of 1935.

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* C.C.C. A. No. 44 of 1937. 16th February, 1939.

C. M. Ramalinga Aiyar for Appellants.

N. S. Rangaswami Aiyangar for Respondent.

The judgment of the Court was delivered by

Burn, J.—This is an appeal from the decision of the Principal Judge of the City Civil Court in O. S. No. 774 of 1935. The plaintiffs are the two sons of one Chinna Ramiah Chetty who was the owner of a house in Selvavinayakar Koil Street, Madras City. He sold this house on the 30th of August, 1911, to the defendant S. P. Perumal Chettiar. The purchase price was fixed at Rs. 2,600 and out of this sum, Rs. 800 was left with the vendee on condition that he should keep it until Kondal Chetty, a minor illegitimate son of the vendor, should attain his majority. The defendant undertook at the same time to pay interest at the rate of 14 annas per cent. per mensem on the amount of Rs. 800. Chinna Ramiah Chetty, the vendor, died in 1920 and his illegitimate son Kondal Chetty is said to have disappeared shortly afterwards. In 1930 the plaintiffs who are the legitimate sons of Chinna Ramiah Chetty demanded payment of the Rs. 800 to them with interest at the rate of 10½ per cent. per annum from June, 1920, when their father was said to have died. The defendant repudiated liability and the plaintiffs filed this suit in *forma pauperis* on the 11th of July, 1935.

The learned Judge of the City Civil Court framed the following issues:—

(1) When did Kondal Chetty attain majority?

(2) At what date can Kondal Chetty be presumed to have been dead? And is he dead?

(3) Are the plaintiffs entitled to claim the money as members of the joint family consisting of themselves and Chinna Ramiah Chetty, deceased?

(4) Are the plaintiffs entitled to claim the money as surviving members of the joint family consisting of themselves and Kondal Chetty?

(5) Are the defendants trustees in respect of the said money and are they bound to repay the said money as such trustees to the plaintiff?

(6) Is the suit barred by limitation?

(7) Are the plaintiffs entitled to a charge on the suit properties for the amount claimed?

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(8) What amount, if any, are the plaintiffs entitled to?

(9) To what reliefs are the plaintiffs entitled?

In his judgment the learned Judge held that the suit was barred by limitation. He held that Kondal Chetty must have attained his majority in the year 1922. He held that the money was payable on Kondal Chetty's attainment of majority and since the suit was not filed till 11th of July, 1935, he held that, whether the six years' rule applied or the twelve years' rule, it would be barred by limitation. He held on the second issue that Kondal Chetty might be presumed to be dead but he did not express any opinion as to the date of his death. On issues 3 and 4 he found in favour of the plaintiffs. This appeal has been admitted, again in *forma pauperis*, at the instance of the plaintiffs.

The principal argument of learned Counsel for the appellants is that the learned Judge of the Court below was wrong in holding the suit is barred by limitation. It is contended that the defendant was a trustee of the Rs. 800 and that therefore under S. 10 of the Indian Limitation Act, the suit cannot be barred by limitation. This argument is based upon the language of the sale-deed (Ex. III) dated the 30th of August, 1911 and the bond (Ex. IV) executed the next day by the defendant in favour of the plaintiffs' father as the guardian of Kondal Chetty. Learned Counsel argues that by these documents an express trust was created in respect of the Rs. 800, the defendant being the trustee and the beneficiary Kondal Chetty. We are not able to accept this argument. S. 10 of the Indian Limitation Act deals with suits against persons in whom property has been "vested in trust for any specific purpose". Now in Ex. III, the words relating to the amount of Rs. 800 are as follows:—

"The amount I retained with you this day for the minor Kondal Chetty, aged 7 years, son of my deceased wife by affection, namely, Seethammal, is Rs. 800. As you alone have been keeping this sum of Rs. 800 and if the said minor Kondal Chetty should ask you for the said amount after he had attained majority, you should get a release deed from him and pay off the said amount."

This is the version given by this Court's translator. The second sentence would be more literally translated as follows:

"In the matter of you yourself retaining this sum of Rs. 800 and in the matter of the said minor Kondal Chetty asking you for the said amount after he attains majority, you should pay off the said amount and get a release deed from him."

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The language of the bond Ex. IV is more explicit. It runs as follows:—

' On the 30th August, 1911, you made a sale to me of articles and of house bearing door No. 2/34 in the eastern row of Selvavinayakar Koil Street, Old Washermanpet, Police H Division, Madras-Chingleput District, for a sum of Rs. 2,600 and out of that amount you have received Rs. 1,800 from me to discharge your debts and towards the maintenance of your family and the balance is Rs. 800. As this sum of rupees eight hundred is reserved with me on behalf of the said minor Kondal Chetty, I shall pay an interest of Rs. 7 (rupees seven) on the said sum at Rs. 0-14-0 per cent. per mensem from this day forwards, either once a month or once in six months to you in person or to your order, for the maintenance of the said minor and obtain receipt from you. As regards the said principal sum of rupees eight hundred, the same will be paid to the said Kondal Chetty as soon as he attains proper age either by myself or by my heirs without raising any objections whatever and after getting a release deed from him as mentioned in the sale-deed executed to me by you. In default, you shall realise the amount by proceeding against me and against my other properties. To this effect have I executed this bond."

We are not able to find in the language of either Ex. III or Ex. IV any words vesting the sum of Rs. 800 in the defendant. There is nothing, in our opinion, to indicate that the ownership in the Rs. 800 was transferred by the plaintiffs' father to the defendant without transfer of ownership there can be no "trust". *Vide* Ss. 3, 5 and 6 of the Trusts Act. S. 10 of the Indian Limitation Act has no application to what are sometimes called constructive trusts, more accurately described in the Trusts Act as "obligations in the nature of a trust" but only to trusts properly so-called, as defined in the Trusts Act. In the present case, since the vendor retained the property in the sum of Rs. 800, the transaction is nothing more nor less than a loan of the Rs. 800 to the defendant, the loan to be discharged by paying Kondal Chetty on his attaining majority. The learned Judge of the Court below was therefore quite right in holding that S. 10 of the Limitation Act had no application. For this reason, almost all the cases cited in argument before us on behalf of the appellants are beside the point. There is therefore nothing to be gained by a discussion of the cases in *Muhammad Mathar Rowthan* v. *Kasa Rowthan*[1], *Nachimuthu* v. *Muthuswami*[2], *Official Assignee of Madras* v. *Krishnaji Bhat*[3], *Official Assignee of Madras* v. *Krishnaji*

1. A.I.R. 1924 Mad. 920. 2. A.I.R. 1934 Mad. 273.
3. (1929) 59 M.L.J. 718.

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Bhati, *Veerappa Chetty* v. *Official Assignee of Madras*[2], *Nagappa Chettiar* v. *Official Assignee of Madras*[3], *Vairavan Chetty* v. *Chettichi Achi*[4] and *Krishnajee* v. *Sadasiva*[5]. In all those cases, either an express trust was admitted, or the facts show that the property alleged to be trust property vested in the person alleged to be the trustee. In the present case, as we have already said, there was no vesting of the Rs. 800 in the defendant.

The next argument on behalf of the appellants is that even if this transaction be treated as one of loan, it must be held that the money was deposited with the defendant, and was not payable until demanded by Kondal Chetty. In this point also, we agree with the learned Judge of the Court below that the amount was payable on Kondal Chetty's attainment of majority and since the bond Ex. IV is a registered document, the period of limitation is that fixed in Art. 116 of the Limitation Act, namely, 6 years from the date on which Kondal Chetty attained majority. As the learned Judge observes, Kondal Chetty is described in Ex. III as a minor aged 7 years. He should therefore have attained his majority sometime in 1922. It has been contended before us that the description in Ex. IV of Kondal Chetty as a child of 7 years of age means that he was in his 7th year and that therefore he would not attain his majority until sometime in 1923. But that clearly makes no difference if, as we have held, the article applicable is 116. The learned counsel for the respondent has contested the learned Judge's finding that the plaintiffs are the heirs of Kondal Chetty but in the view that we have taken of the nature of the contract between the defendant and the plaintiffs' father, it is not necessary to decide this point.

We agree with the learned Counsel for the respondent that there can be no question in this case of a vendor's lien on the property sold for the unpaid balance of purchase money—vide *Swaminatha Odayar* v. *Subbarama Aiyar*[6].

This appeal is accordingly dismissed with costs. The court-fee due to Government must be paid by the appellants.

K. C. —— *Appeal dismissed.*

1. (1933) 65 M.L.J. 1: L.R. 60 I.A. 203: I.L.R. 56 Mad. 570 (P.C.).
2. (1934) 161 I.C. 891.
3. (1930) 60 M.L.J. 355.
4. A.I.R. 1936 Mad. 876.
5. A.I.R. 1927 Mad. 249.
6. (1926) 51 M.L.J. 856: I.L.R. 50 Mad. 548.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW.

Kannayya Reddi .. *Petitioner** *(Plaintiff)*

v.

Muthu Reddi .. *Respondent* *(Defendant)*.

Kannayya Reddi *v.* Muthu Reddi.

Contribution—Partners—Joint decree passed against partners—Transaction not based on partnership—Claim for contribution—Maintainability.

It is only when the claim for contribution is based on the contract of partnership or intimately bound up with the relation of partnership that a claim for contribution would be excluded by the general doctrine that as between partners there can be no claim for contribution. But where the basis of the claim as between the partners was not a partnership transaction but a joint decree made against the plaintiff and the defendant in execution of which the plaintiff alone had to pay the entire amount due under the decree, the law of partnership did not prohibit the entertainment of the claim for contribution.

Subbarayudu v. *Adinarayudu*, (1894) I.L.R. 18 Mad. 134 and *Ellappa Mudaliar* v. *Swaminatha Mudaliar*, (1933) 38 L.W. 316, referred to.

Petition under S. 115 of Act V of 1908, praying the High Court to revise the decree of the District Court of North Arcot at Vellore, dated 29th August, 1935 and passed in A.S. No. 21 of 1935 preferred against the decree of the Court of the District Munsif of Arni dated 16th November, 1934 and passed in O. S. No. 332 of 1934.

Ch. Raghava Rao, S. Rajaraman and *S. Kothandarama Nayanar* for Petitioner.

C. R. Rajagopalachari for Respondent.

The Court delivered the following

JUDGMENT.—The point raised in this petition is whether the claim of the plaintiff, who is the petitioner in this Court, for contribution is not maintainable. This objection to the claim was not made in the trial Court which passed the decree in favour of the plaintiff; it was only in the lower appellate Court that for the first time it was contended that on the admission of the plaintiff in his evidence that the debt in respect of which a decree had been passed against the plaintiff and the defendant had been borrowed by himself and the defendant for the purpose of a partnership trade carried on by them, the claim for contribution was not maintainable. It is not possible to say that the admissions of the plaintiff clearly show that the borrowing itself was a partnership transaction. It is one thing

* C. R. P. No. 488 of 1936. 10th February, 1939.

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to say that money was borrowed as it was required for the partnership trade by both the partners, the borrowing itself not being a partnership transaction though the partners borrow it in order to advance it to the partnership as capital, and it is quite another thing to say that the borrowing itself was by the partnership. In any case the present claim is not based on the ground that as a partner the defendant is liable to contribute. The basis of the claim is a joint decree made against the plaintiff and the defendant in execution of which the plaintiff alone had to pay the entire amount due under the decree. In such a case the law of partnership does not prohibit the entertainment of a claim for contribution. It is only when the claim for contribution is based on the contract of partnership or intimately bound up with the relation of partnership that it would be excluded by the general doctrine that as between partners there can be no claim for contribution. I have had occasion already to consider the question and I have expressed my opinion that in cases of this kind where the claim for contribution is based on the payment by the plaintiff in its entirety of a joint decree debt due by him and by the defendant, the claim for contribution cannot be defeated even if the original debt in respect of which the decree was passed was a partnership debt. The advocate for the petitioner has relied on two cases, namely, those reported in *Subbarayudu* v. *Adinarayudu*[1] and *Ellappa Mudaliar* v. *Swaminatha Mudaliar*[2]. The latter case was one in which the decree had been obtained by a stranger in respect of a partnership debt and the plaintiff alone had to pay up the whole of the decree amount and it was held that the plaintiff was entitled to recover contribution. The decree of the lower appellate Court therefore is not in accordance with law and must be set aside. It is accordingly set aside and the decree of the trial Court is restored. The petitioner, who is the plaintiff in the suit, will be entitled to his costs in this and in the lower appellate Court.

B.V.V. —— *Petition allowed.*

1. (1894) I.L.R. 18 Mad. 134. 2. (1933) 38 L.W. 316.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN AND MR. JUSTICE STODART.

Santhappa and others .. *Appellants* in both (Counter-petitioners 1, 7 and 8)*

v.

Siddalingayya Eswarappa Bulla, minor by next friend and mother Sangavva and others .. *Respondents (Petitioners and Counter-petitioners.)*

Santhappa *v.* Siddalingayya Eswarappa Bulla.

Limitation Act (IX of 1908), Art. 182, cl. (5)—Application to proper Court to transmit decree to another District—Transferee Court named not in existence at the time—Mistake of fact as to existence of such Court—If application in accordance with law—Decree for payment of money also charged on properties—If personal decree.

Where a decree-holder filed an execution petition before the Court which passed the decree, praying for transmission of the decree for execution to Bellary for execution, but under a mistaken impression of fact that there was in existence a First Class Subordinate Judge's Court at Bellary which was the competent Court to execute, applied for transmission to such a Court,

Held, the application is one in accordance with law, as it is due to a mistake of fact as to the existence of such a Court. The request was to transmit the decree for execution to Bellary District and the mistake of fact as to the Court does not make the application one not in accordance with law.

Where a decree explicitly stated that the defendants shall pay the plaintiff a certain sum, and further recited that certain properties are charged for the amounts due under the decree, the decree is a personal decree and can be executed by proceeding also against properties other than those charged. But the charged properties must be proceeded against first.

Appeals against the order of the District Court of Bellary dated 10th April, 1937, and made in E. P. No. 74 of 1936 in C. S. No. 168 of 1923 on the file of the Additional First Class Subordinate Judge's Court, Dharwar.

B. Somayya and *Kasturi Seshagiri Rao* for Appellants.

V. S. Narasimhachar for Respondents.

The judgment of the Court was delivered by

Burn, J.—These are appeals from the orders of the learned District Judge of Bellary passed on two execution petitions. The principal objection raised on behalf of the judgment-debtors was that the execution petitions were barred by limitation. They contended also that the decree-holder had applied for the attachment of property which by the terms of the decrees he Burn, J.

*C.M.A. No. 458 of 1937. 2nd November, 1938.

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was not entitled to attach and sell. The decrees in the suits were passed on the 10th March, 1927. These execution petitions were filed on the 5th April, 1936. *Prima facie*, they are barred by limitation. But the decree-holder relies upon two earlier applications which he made on the 6th April, 1933, to the Court of the Additional First Class Sub-Judge, Dharwar (the Court which passed the decrees) for transmission of the decrees to Bellary for execution. It is admitted that if these applications of the 6th April, 1933, were applications made to the proper Court, and in accordance with law, the applications put in on the 5th April, 1936, are not barred by limitation. It is common ground that the applications of 6th April, 1933, were made to the proper Court. The only ground upon which they are said to have been made not in accordance with law is that in applying to the Additional First Class Sub-Judge, Dharwar, the decree-holder requested that the decrees might be transmitted for execution to "the First Class Subordinate Judge, Bellary." On the 6th April, 1933, there was no Sub-Court in existence in the District of Bellary, and the contention on behalf of the appellants therefore is that the applications having been made for transmission to a Court which did not exist cannot be said to have been made in accordance with law. In support of this contention we have been referred to the rulings in *Sital Prasad Shukul* v. *Babu Lal Shukul*[1], *Amrit Lal* v. *Murlidhar*[2], *Maharaja of Bobbili* v. *Narasaraju Bahadur*[3] and *Peirce Leslie & Co., Ltd.* v. *Perumal*[4]. We do not think that any of these decisions has any bearing upon this case because in all of them the application was made for transfer to a Court actually in existence but without pecuniary jurisdiction to execute the decrees; a mistake of law which the petitioner could have avoided. This is not, we think, the same as applying for transmission to a Court which does not exist but which the petitioner wrongly believes to exist. That is a mistake of fact in our opinion. It has to be borne in mind that Bellary is a District in which from time to time a Sub-Court is brought into existence temporarily. Up to the end of February, 1933, there was a Sub-Court in the District of Bellary with its headquarters at Bellary and with jurisdiction over the whole District. It was not a "First Class" Sub-Court for the simple reason that there are no grades of Sub-Courts in this Presi-

1. (1932) I.L.R. 11 Pat. 785. 2. (192?) I.L.R. 1 Pat 651.
3. (1916) 31 M.L.J. 300: L.R. 43 I.A. 238 : I.L.R. 39 Mad. 640 (P.C.).
4. (1917) 33 M.L.J. 130: I.L.R. 40 Mad. 1069 (F.B.).

dency. It appears to us that learned Counsel for the respondent decree-holder is on firm ground when he contends that the applications made to the Dharwar Court were entirely in accordance with law but were in one slight particular out of accordance with fact. The decree-holder could not be held responsible for knowing that First Class Sub-Courts do not exist in this Presidency he being a resident in the Bombay Presidency. It is clear that even the Additional First Class Sub-Judge of Dharwar was not aware of the fact that there are no First Class Subordinate Judges in this Presidency. There is no ground for holding that the decree-holder was applying for transmission of his decrees for execution to a Court without jurisdiction to execute them. It is not disputed on behalf of the appellants that the decree-holder wanted his decrees to be transferred to the Bellary District so that they could be executed. He wanted them to be transferred to a Court with jurisdiction to execute them. The sole mistake which he made was not a mistake of law but a mistake in the description of the Court to which he requested that his decrees might be transferred. That description would have been more or less sufficient if the petition had been filed six weeks earlier. For these reasons we are clearly of opinion that the execution petitions presented to the Additional Subordinate Judge of Dharwar on the 6th April, 1933, were applications made to the proper Court in accordance with law. It follows that the execution petitions filed on the 5th April, 1936, were not barred by limitation and that the decision of the learned District Judge on this point is correct.

It is not necessary to deal with the point raised on behalf of the respondent that in any case the execution of these decrees for the whole of the sums due under them would not have been barred by limitation because the decrees were decrees for payment by instalments and the execution petitions were filed within three years after some, at any rate, of the instalments had fallen due. We are of opinion that for the whole amount due under the decrees the petitions are not barred by limitation.

The only other point taken on behalf of the appellants is one which has not been dealt with by the learned District Judge though we see that it was raised before him. This is to the effect that the decrees can only be executed by sale of the properties which are charged in the decrees with liability for the amounts due. Both the decrees recite that certain properties

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are charged for the amounts due under the decrees. Mr. Somayya for the appellants contends that this is the sole liability and that if the properties charged are insufficient to realise the amounts due under the decrees there is no further liability and no other properties of the defendants can be attached and sold. On a perusal of the decrees we find ourselves unable to accept this contention on behalf of the appellants. Both the decrees state explicitly that the defendants shall pay the plaintiff such and such a sum. We think that these are clearly personal decrees and that they impose a personal liability in case the properties do not realise the amounts due under the decrees. The executing Court will of course take care to see that the charged properties are proceeded against in the first instance and that no other properties of the defendants are sold until the charged properties have been exhausted.

These appeals are accordingly dismissed with costs of the first respondent.

S. V. V. —— *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE LAKSHMANA RAO.

Bethambhotlu Subbayya of Tangutur .. *Petitioner (Accused)**

v.

Pothula Venkata Narasayya .. *Respondent (Complainant).*

Subbayya v. Venkata Narasayya.

Madras Local Boards Act (XIV of 1920)—Panchayat Board President—Failure to hand over charge to successor—Offence under S. 208 (3)—If cognisable without sanction of Local Government under S. 227-A.

Where a person while acting or purporting to act as a President of a Panchayat Board refuses to hand over charge to the succeeding President disputing the validity of his appointment, the Court cannot take cognisance of the offence under S 208 (3) of the Madras Local Board's Act without the previous sanction of the Local Government under S. 227-A.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Joint Magistrate, Ongole, dated 23rd December, 1937 and passed in Criminal Appeal No. 84 of 1937 preferred against the judgment of the Court of the Stationary Sub-Magistrate, Ongole, dated 8th November, 1937 and passed in Calendar Case No. 238 of 1937.

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* Crl. R. C. No. 303 of 1938. 6th October, 1938.
(Crl. R. P. No. 291 of 1938).

Subbayya v. Venkata Narasayya.

K. Kottayya for Petitioner.

B. V. Ramanarasu for Respondent.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court made the following

ORDER.—The petitioner was the Vice-President of the Panchayat Board of Tangutur and owing to a vacancy in the Office of the President he was acting as President from November, 1936. The complainant was elected President at a meeting held on 29th May, 1937, but the petitioner disputed the validity of the meeting and declined to hand over charge of the office to the complainant till 10th July, 1937. He has therefore been convicted under S. 208 (3) of the Madras Local Boards Act for failure to hand over charge to the complainant but the offence was committed by the petitioner while acting or purporting to act in the discharge of his official duty and S. 227-A of the Madras Local Boards Act provides that no Court shall take cognisance of such offence except with the previous sanction of the Local Government. There was no sanction in this case and the trial is illegal. The conviction of the petitioner is therefore set aside and the fine if levied will be refunded.

S. V. V. ——— *Conviction set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

1. His Highness Sri Sri Sri Lieut-Col. Sir Rajah Velugoti Govinda Krishna Yachendra Bahadur Varu, Panchahazar Mansabdar, K.C.I.E., Maharajah Sahib of Venkatagiri (dead) and 2. Raja Velugoti Sarvagna Kumara Krishna Yachendra Bahadur Varu, Legal Representative of the deceased first Appellant (*vide* Order dated 25th October, 1937, on C.M.P. No. 3280 of 1937 .. *Appellants**

v.

Raja Rajeswara Rao and another .. *Respondents.*

Maharajah of Venkatagiri v. Raja Rajeswara Rao.

Hindu Law—Mitakshara—Impartible estate—Joint family—Sudras—Family settlement deed—Construction—'Purusha santhathi'*—If includes illegitimate sons—Illegitimate sons of junior members—Custom allowing maintenance to—If unreasonable—Maintenance under Hindu Law—Right to—*

* Appeal No. 227 of 1936. 10th February, 1939.

Maharajah of Venkatagiri v. Raja Rajeswara Rao.

Basis of assessment—Madras Impartible Estates Act (II of 1904 as amended by Act XII of 1934)—Effect on right.

The suit was filed by the respondents to establish (1) their status as illegitimate sons of one *V*, the paternal uncle of the Maharajah of Venkatagiri, the appellant, and (2) their right to maintenance by custom and under Hindu law, out of the Venkatagiri zamindari which is impartible and the succession to which is governed by the law of primogeniture. The respondents also averred that they were entitled under a deed of family settlement dated the 8th April, 1889, as '*purusha santhathi*' of *V* to an allowance of Rs. 1,000 per mensem from the death of their father.

The Subordinate Judge held that the respondents had established their status as illegitimate sons of *V* and their claim to maintenance from the estate at the rate of Rs 1,000 per mensem, as '*purusha santhathi*' of *V*, under the settlement deed, but found against them in so far as their case was based on custom and Hindu law. The Subordinate Judge also held that the respondents were entitled to arrears of allowance from the 20th June, 1920, the date of the death of their father and made the allowance a charge on the estate. The appellants accepted the finding as to status but challenged the decision that the respondents were entitled to maintenance out of the estate. The respondents by their memorandum of cross-objections claimed that the Subordinate Judge erred in holding that they are not entitled to maintenance by reason of custom and maintained their plea that even apart from the deed they have a right to maintenance under Hindu law irrespective of custom.

Held (by separate but concurring judgments), the words '*purusha santhathi*' mean "male issue, progency or descendants" and used in their widest sense the words would cover illegitimate descendants. But in the circumstances surrounding the execution of the deed in the present case, it is not likely that the members of the family who subscribed their names to the document had any intention of making provision for illegitimate descendants; an examination of the document shows a clear intention to exclude them and the respondents are not entitled to maintenance by reason of the family settlement.

A custom in a Hindu family to grant maintenance to illegitimate sons could not be regarded as being unreasonable. But the evidence adduced by the respondents is not sufficient to prove either a family or territorial custom.

The Madras Impartible Estates Act (II of 1904 as amended by Act XII of 1934), leaves untouched any rights which the respondents may have under Hindu law. If the question, whether the respondents are entitled to maintenance under Hindu law, is to be governed by the judgments in the second Pittapur case, *Rama Rao* v. *Rajah of Pittapur*, (1918) 35 M.L.J. 392: L.R. 45 I.A. 148: I.L.R. 41 Mad. 778 (P.C.); *Protab Chandra Deo* v. *Jagadish Chandra Deo*, (1927) 53 M.L.J. 30: L.R. 54 I.A. 289 (P.C.) and *Shiba Prasad Singh* v. *Prayag Kumari Debi*, (1932) 63 M.L.J. 196: L.R. 59 I.A. 331: I.L.R. 59 Cal. 1399 (P.C.), the answer must be adverse to them. But in the judgment in *The Collector of Gorakhpur* v. *Ram Sunder Mal*, (1934) 67 M.L.J. 274: L.R. 61 I.A. 286: I.L.R. 56 All. 468 (P.C.), the Privy Council recognises that an impartible estate can be regarded as joint family property, giving the members of the family a right to maintenance and a right in the junior branch to succeed by survivorship to the estate on the extinction of the senior branch and it leaves the way open to the Court to follow the decisions of the Board earlier than the second *Pittapur case*, (1918) 35 M.L.J. 392: L.R. 45

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I.A. 148: I.L.R. 41 Mad. 778 (P.C.), on questions relating to maintenance, recognising the right of a junior member however remote to maintenance out of the joint family estate as a consequence of his membership alone without proof of a custom [for example, *Chellapalli case*, (1900) 10 M.L.J. 294: L.R. 27 I.A. 151: I.L.R. 24 Mad. 147 (P.C.); *Sartaj Kuari* v. *Deoraj Kuari*, (1888) L.R. 15 I.A. 51: I.L.R. 10 All. 272 at 285 (P.C.); and *Periasami* v. *Periasami*, (1878) L.R 5 I.A. 61: I.L.R. 1 Mad. 312 (P.C.)]. *Collector of Gorakhpur* v. *Ram Sundar Mal*, (1934) 67 M.L.J. 274: L.R. 61 I.A. 286: I.L.R. 56 All. 468 (P.C.), is definite in regarding the right to maintenance of junior members of the family as being based upon the joint ownership of the estate. There are no degrees of relationship to be taken note of for the purpose of maintenance. The respondents are members of the family (*Vellaiyappa Chetty* v. *Natarajan*, (1931) 61 M.L.J. 522: L.R. 58 I.A. 402: I.L.R. 55 Mad. 1 (P.C.), followed.

In these circumstances, the respondents are entitled under Hindu law to maintenance out of the estate.

If a person is entitled in law to be maintained out of an ancestral estate, the possession of private property cannot destroy his right. *Lingayya* v. *Kanakamma*, (1913) 28 M.L.J. 260: I.L.R. 38 Mad. 153 and *Kodandarami Reddi* v. *Chenchamma*, (1929) 59 M.L.J. 531, applied.

The amount must be fixed with regard to the position of the family and it is not a matter of granting compassionate allowance. *Ananthayya* v. *Vishnu*, (1893) I.L.R. 17 Mad. 160 and *Rathinasabapathi Odayar* v. *Gopala Odayar*, (1928) 56 M.L.J 673, followed.

The rule that an illegitimate son of a Sudra is entitled to half of what a legitimate son is entitled to in his father's estate may be taken as a guide in fixing the amount of his allowance for maintenance and Rs. 250 per mensem for each of the respondents is a reasonable allowance. The respondents are entitled to an allowance for maintenance from the date of their father's death. They are entitled to have the amounts payable to them charged on the estate.

Case-law reviewed and discussed.

Appeal against the decree of the Court of the Subordinate Judge of Nellore dated 18th March, 1936 and made in O. S. No. 30 of 1932.

The Right Hon'ble Sir Tej Bahadur Sapru, P.C., of the Allahabad Bar with *P. V. Rajamannar*, *K. Subba Rao* and *P. S. Raghavarama Sastri* for Appellants.

S. Srinivasa Aiyangar with *U. Ramachandran* and *M. A. Sesha Reddi* (of the Nellore Bar) for Respondents.

The judgment of the Court was delivered by

The Chief Justice.—This appeal raises the question of right of illegitimate sons of a member of a joint family of the Sudra caste to maintenance out of the family estate when it is impartible. The suit was filed by the respondents in the Court of the Subordinate Judge of Nellore to establish their status as illegitimate sons of Venugopal, the paternal uncle of the appellant, the Maharajah of Venkatagiri, and the right which they claimed to maintenance out of the Venkatagiri zemindari, the succession to

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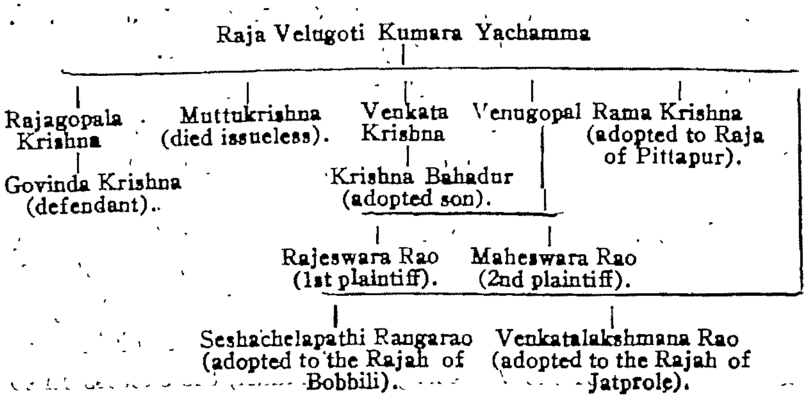
which is governed by the law of primogeniture. They averred that they were entitled under a deed of family settlement, dated the 8th April, 1889, to an allowance of Rs. 1,000 per mensem from the death of their father, which occurred on the 20th June, 1920, but their claim did not rest on the deed alone. They said that irrespective of the deed they were entitled to an allowance for maintenance by custom and also under Hindu Law. The appellant refused to recognise the respondents as the illegitimate sons of his uncle and said that even if they were his sons they were not entitled to be maintained by the estate. The Subordinate Judge held that the respondents had established their status as illegitimate sons of Venugopal and their claim to maintenance from the estate at the rate of Rs. 1,000 per mensem under the deed of the 8th April, 1889, but found against them in so far as their case was based on custom and Hindu Law. The Subordinate Judge also held that the respondents were entitled to an allowance from the date of the death of their father and included in the decree a direction to the appellant to pay the respondents Rs. 1,44,000 as arrears of the allowance. The allowance was made a charge on the estate. The appellant accepts the finding of the trial Court on the question of status, but challenges the decision that they are entitled to maintenance out of the estate.

The Venkatagiri family belongs to the Velama community, a sub-division of the Sudra caste. In the year 1878, the estate was in the possession of Rajah Velugoti Kumara Yachama, who had seven sons, three of whom had before that year been given in adoption. The relationship of the parties will be more readily appreciated if I reproduce the pedigree set out in the judgment of the lower Court:—



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In October, 1878, Raja Velugoti Kumara Yachama handed over the estate to his eldest son Rajagopala Krishna. In 1889 Muthukrishna and Venkatakrishna, the two brothers nearest in age to Rajagopalakrishna, claimed that the Venkatagiri zemindari was partible and that the four brothers who remained in the family were each entitled to a fourth share in the family properties. As the result of advice given to them by their father and friends of the family Muttukrishna and Venkatakrishna withdrew the claim to partition and recognised the zemindari to be impartible, but the settlement involved the payment of large sums of money to the three younger brothers, Muttukrishna, Venkatakrishna and Venugopal. Venugopal was then a minor. The terms were embodied in the deed of 8th April, 1889, Venugopal being represented by his father. It will be necessary to refer to certain of the provisions of the deed in detail, but for the purpose of the narrative its terms may be summarised as follows:—(1) The Venkatagiri estate should be treated as impartible and should descend along the eldest line of descent; (2) Muttukrishna, Venkatakrishna and Venugopal should each receive a sum of Rs. 5,81,252-11-10; (3) Muttukrishna, Venkatakrishna and Venugopal should also receive a sum of Rs. 40,000 each for the purpose of purchasing or building a residence; (4) Venkatakrishna and Venugopal being unmarried should each receive Rs. 15,000 for marriage expenses; (5) Rajagopalakrishna and his successors to the estate should pay to Muttukrishna, Venkatakrishna and Venugopal a sum of Rs. 1,000 each per mensem for life and on their death, a similar amount to their male descendants by way of maintenance, the amount payable to each branch being Rs. 1,000 irrespective of the number of descendants. In 1890 a suit was filed on behalf of Venugopal impeaching the settlement and reiterating the claim that the estate was partible. The suit was filed shortly before Venugopal came of age. On his attaining majority he withdrew the suit and recognised the validity of the deed of the 8th April, 1889. The settlement therefore became final so far as the brothers were concerned.

Venugopal never married, but by one Saraswathamma he had two sons, the respondents. Saraswathamma was of the Balija community, also a sub-division of the Sudra caste. Under Hindu law the illegitimate son of a Sudra by a *dasi*, that is, a Hindu concubine in his continuous and exclusive keeping, is en-

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titled not only to maintenance but to a share in the estate of his father, the share being half that of a legitimate son. It is conceded that Saraswathamma's status was that of a *dasi*. The first respondent was born on the 24th September, 1907. There is no evidence when the second respondent was born, but he is the younger of the two. On the 28th August, 1916, Venugopal executed a will under which he left Rs. 5,000 to a nephew, Rs. 5,000 to a niece, Rs. 5,000 to Saraswathamma for the construction of a house, Rs. 5,000 to one servant, five sums of Rs. 200 each to other servants, a garden in Venkatagiri to two nephews, and the remainder of his estate to the respondents. Venugopal died on the 20th June, 1920, and probate of his will was obtained. The record of the probate proceedings shows that the net estate was sworn at Rs. 10,04,518-14-5. Charges of maladministration against one of the executors were made subsequently and it would appear that a large portion of the property which Venugopal left was lost. The suit out of which this appeal arises was instituted on the 4th July, 1932, just over twelve years after the death of Venugopal, but it was within time as the period of limitation expired during the Court vacation and the suit was filed on the reopening day. The reason given for the delay in filing the suit was that the respondents were not aware of their rights until 1930.

Two grounds have been urged in support of the appeal. In the first place it is said that the Subordinate Judge erred in holding that the respondents are entitled to maintenance under the deed. In the second place it is said that even if the deed can be read as conferring a right to maintenance on the illegitimate sons of Venugopal it is bad because it offends against the first rule laid down in *Tagore's case*[1], in that by limiting the right to maintenance to male descendants it creates an estate unknown to Hindu Law. The respondents, in addition to denying the validity of the appellant's contentions, say that the trial Court erred in holding that they are not entitled to maintenance by reason of custom, and maintain their plea that they have a right to maintenance under Hindu Law irrespective of custom. The appeal therefore raises all the questions raised in the trial Court except that relating to the status of the respondents.

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1. (1872) 9 Beng.L.R. 377 (P.C.).

The provisions with regard to maintenance are contained in cl. 5 of the deed of settlement. Owing to criticism of the translations of the document which appear in the printed record the Court had this clause re-translated. The new translation has been accepted by both parties as being correct and in view of the importance of the clause I will set it out in full:—

"As the said Venkatagiri Estate is impartible and as the aforesaid Sri Muttukrishna Yachendrnlu Varu, Sri Venkatakrishna Yachendrulu Varu, and Sri Venugopala Krishna Yachendrulu Varu and their *purusha santhathi* (male issue, progeny or descendants) are entitled to get allowances from the said Estate, we the aforesaid the Honourable Rajah Velugoti Sri Rajagopala Krishna Yachendra Bahadur, Panchahazar, Mansabdar, K.C.I.E, Rajah of Venkatagiri, Sri Muttukrishna Yachendrulu, Sri Venkatakrishna Yachendrulu and on behalf of Sri Venugopala Krishna Yachendrulu, his father and guardian Sri Rajah Velugoti Kumara Yachama Nayudu Bahadur, C.S.I., appointed the Rajah of Bobbili, namely, Sri Rajah Rao Venkata Swetachalapati Ranga Rao Bahadur Varu, as mediator, to determine the amount of allowance to be given to the said Sri Muttukrishna Yachendrulu, Sri Venkatakrishna Yachendrulu and Sri Venugopala Krishna Yachendrulu and to their *purusha santhathi*. The abovenamed mediator fully taking into consideration the status of all the parties, the condition and respectability of the Estate and all other matters which are fit to be considered, decided that the said Honourable Rajah Velugoti Sri Rajagopala Krishna Yachendra Bahadur, Panchahazar, Mansabdar, K.C.I.E., Rajah of Venkatagiri, should pay allowances in the manner fixed herein below:—

In pursuance of that decision, the said Honourable Rajah Velugoti Sri Rajagopala Krishna Yachendra Bahadur, Panchahazar, Mansabdar, K.C.I.E., Rajah of Venkatagiri, and those that succeed to the rule after him, undertake and accept by means of these documents to pay allowances every month from the income of that estate, from the 6th April, 1889, in the manner stated below:—

Sri Muttukrishna Yachendrulu shall be paid at the rate of Rupees one thousand (Rs. 1,000) per month for the rest of his life; Sri Venkatakrishna Yachendrulu at the rate of Rupees One thousand (Rs. 1,000) per month for the rest of his life; and the minor Sri Venugopala Krishna Yachendrulu, until his minority ceases, by his father and guardian, Sri Rajah Velugoti Kumara Yachama Nayudu Bahadur, C.S.I. ,and, after his minority ceases, the said Venugopala Krishna Yachendrulu (himself) Rupees One thousand (Rs. 1,000) per month, for the rest of his life; the said Hon'ble Rajah Velugoti Sri Rajagopala Krishna Yachendra Bahadur, Panchahazar, Mansabdar, K.C.I.E., Rajah of Venkatagiri, and the Rajahs that rule in Venkatagiri after him, shall, after the lifetime of the said Sri Muttukrishna Yachendrulu, pay his *purusha santhathi* (male issue, progeny, or descendants) in perpetuity in the manner aforesaid the same allowance, that is, at the rate of Rupees One thousand (Rs. 1,000) per month. After the life of the said Sri Venkatakrishna Yachendrulu, his *purusha santhathi* shall, in perpetuity, be paid the same allowance amount, that is,at the rate of Rupees One thousand (Rs.1,000) per month in the aforesaid manner. After the life of the said Sri Venugopala Krishna Yachendrulu, his *purusha santhathi* shall, in perpetuity, be paid the same allowance amount, that is, at the rate of Rupees One thousand

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(Rs. 1,000) per month, in the aforesaid manner. But, if, at any time, in any one of the branches of the said Sri Muttukrishna Yachendrulu, Sri Venkatakrishna Yachendrulu and Sri Venugopala Krishna Yachendrulu, there be more than one male member, such males, and their *purusha santhathi* shall take the said allowance amount of Rupees One thousand in proportion to their respective shares, in the same manner as they would respectively take their other properties separately by way of inheritance according to the Hindu Law. Moreover, if in any of the aforesaid three branches of our family, *viz*., the branch of Sri Muttukrishna Yachendrulu, the branch of Venkatakrishna Yachendrulu, and the branch of the minor Sri Venugopala Krishna Yachendrulu, any male should die without *purusha santhathi*, either by way of *aurasa* or by way of adoption, the allowance amount that was being received by the person who so died without *purusha santhathi* shall go to the gnatis (agnates) who are nearest to him in his own branch according to Hindu Law. Should the aforesaid person who dies without *purusha santhathi*, leave any widow or widows and maintenance have to be paid to them, only the nearest gnatis who get the allowance of such deceased person in the manner mentioned above, shall be liable therefor. Further, should any of the said three branches of our family become extinct by the total absence of *purusha santhathi* either by way of *aurasa* or by way of adoption, the allowance being paid to that branch shall be stopped subject to the condition that, if there be then a widow or widows left of the last male who died in that branch, one-half of the allowance of Rupees One thousand (Rs. 1,000) that was being paid to that male, *viz*, Rupees Five hundred (Rs. 500) shall be paid to the widow or widows of the person who so died without *purusha santhathi* as maintenance for life. But should there be female *santhathi*, in that branch, it shall not be paid to such female *santhathi*, nor shall it be paid to the *purusha santhathi* of the other two branches or to either of the branches, or in any other manner. As all the matters regarding the expenses incurred from out of the income of the said Venkatagiri estate for Sri Rajah Velugoti Kumara Yachama Naidu Bahadur, C.S.I, one of the parties to this document and the father of the other parties have been settled by the registered Kararnamas entered into mutually on the 17th and 19th of March, 1888, between our father Sri Rajah Velugoti Kumara Yachama Nayudu Bahadur, C.S.I., and the Hon'ble Rajah Velugoti Sri Raja Gopala Krishna Yachendra Bahadur, Panchahazar, Mansabdar, K.C.I.E., Rajah of Venkatagiri, those matters relating to the said Rajah Sri Velugoti Kumara Yachama Nayudu Bahadur, C.S.I., are not referred to in this document. But, as the share and allowance of the minor Sri Venugopala Krishna Yachendrulu, have been settled under this document, the Hon'ble Rajah Velugoti Sri Rajagopala Krishna Yachendra Bahadur, Panchahazar, Mansabdar, K.C.I.E., Rajah of Venkatagiri, need not pay for the expenses of Sri Venugopala Krishna Yachendrulu mentioned in he Kararnamas aforesaid dated the 17th and 19th March. 1888."

The Subordinate Judge was of the opinion that the parties did not contemplate the exclusion of illegitimate offspring and as the words *purusha santhathi* were wide enough to cover illegitimate issue he considered that the deed should be so construed. I agree with the Subordinate Judge that the intention of the signatories to the document must be gathered from the

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document itself read in the light of the surrounding circumstances, but I am unable to accept his conclusion.

Now what were the surrounding circumstances? The family was an ancient one and of important standing in the Madras Presidency. Its adult members had all agreed that its estate was impartible and that this should be recognised in a formal deed in which provision should be made for the maintenance of the younger sons and their descendants. While it is true that under Hindu Law, especially where Sudras are concerned, an illegitimate son is in a very different position to that occupied by an illegitimate son under English law, it cannot be said that illegitimacy is regarded with favour in a respectable Hindu family and this much was conceded on behalf of the respondents. In *Subramania Chetty* v. *Mahalakshmi Ammal*[1], Krishnan Pandalai, J., stated that the respect for marriage and the social position of legitimate children is no less among Hindu Sudras than among Brahmins and Englishmen. In this case the Court had to consider a deed of settlement in which the settlor had used the word *santhathi*. As he was sitting alone the learned Judge did not decide whether it would cover illegitimate issue of a Sudra but observed that as a mere question of construction he would hesitate to say that a share of the inheritance being awarded to illegitimate children of Sudras in certain cases was necessarily conclusive of the meaning of a Sudra donor of property as to what he meant when he talked of his *santhathi*. In the circumstances surrounding the execution of the deed in the present case it is not likely that the members of the family who subscribed their names to the document had any intention of making provision for illegitimate descendants and in my opinion an examination of the document shows a clear intention to exclude them.

As is indicated in the accepted translation of clause 5 of the deed the words *purusha santhathi* mean "male issue, progeny or descendants" (*purusha* male, *Santhathi* issue, progeny or descendants) and therefore used in their widest sense the words would cover illegitimate descendants. But it is inconceivable that they should be used in this sense in the first operative clause of the document. This part relates to the succession to the *gaddi* and reads as follows:—

1. A.I.R. 1933 Mad 659.

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"As this Venkatagiri estate is impartible and should descend along the eldest line of descent, the said estate, the immovable properties connected therewith and the other immovable properties acquired with the income of the said estate should be enjoyed by the eldest of us, four brothers, and the heir of the aforesaid Sri Rajah Velugoti Kumara Yachama Nayudu Bahadur C.S.I., namely, the aforesaid the Hon'ble Rajah Velugoti Sri Rajagopala Krishna Yachendra Bahadur, Panchahazar, Mansabdar, K.C.I.E., Rajah of Venkatagiri and after him by his son, son's son and other male descendants (*purusha santhathi*) in the eldest line of descent, that if there be no *aurasa* or adopted sons in the branch of the said Hon'ble Rajah Velugoti Sri Rajagopala Krishna Yachendra Bahadur, Panchahazar, Mansabdar, K.C.I.E., Rajah of Venkatagiri, and if that branch should become extinct without male issue, such near heir in the eldest line as would, according to law and custom, get the family impartible properties and his descendants should enjoy the same and that as regards all these, namely, the said estate, all the properties connected therewith, rights, powers and privileges, the Rulers for the time being shall, according to law and custom, completely possess all the privileges and enjoy them, subject only to the condition of paying allowances to the other members of our family, suitably to their respective status out of the income from the Estate and the properties."

Not only is it inconceivable that the members of this ancient family should contemplate an illegitimate son ascending the *gaddi* but it will be observed that the direction with regard to the succession in the event of Rajagopala Krishna's branch becoming extinct follows the use of the words "if there be no *aurasa* or adopted sons". That an illegitimate son can never be *aurasa* is accepted.

Where a word is used in a document in one sense the same meaning must be given to it where it appears elsewhere in the document unless it is evident from the context that a different meaning should be put upon it. The learned advocate for the respondents had very little to say with regard to the meaning to be attached to the words *purusha santhathi* as used in that part of the document which I have just quoted, but urged that the expression should be given its widest meaning where it appears in cl. 5. There is nothing in the context which warrants the assumption that the words are used in cl. 5 in a different sense from the sense in which they are used in the first operative clause. On the contrary there is again clear indication that the intention was to limit the maintenance allowance to legitimate descendants. The fifth clause provides that where a male member of any of the three branches should die without *purusha santhathi*, "either by way of *aurasa* or by way of adoption", his allowance should go to the *agnates* who are nearest to him in his own branch. The clause further provides that in

the event of any branch becoming extinct by the total absence of *purusha santhathi* "either by way of *aurasa* or adoption," the allowance to that branch shall cease altogether, subject to the widow of the last male member of the branch being entitled to receive half the amount for her lifetime. The express reference to *aurasa* issue or sons by adoption leaves no doubt in my mind that the parties only contemplated the right of maintenance being conferred upon legitimate descendants and that they used the words *purusha santhathi* in this sense. Accordingly I hold that the respondents are not entitled to maintenance out of the income of the Venkatagiri estate by reason of the deed of the 8th April, 1889.

My learned brother shares the opinion which I have expressed with regard to the effect of the deed and therefore it is not necessary to discuss the question whether the document is invalid because it creates an estate unknown to Hindu Law. Therefore I will pass on to consider whether the respondents are entitled to maintenance by reason of custom or the provisions of Hindu Law, and if they are, the amount to be paid to them. The claim based on custom does not call for much discussion as we concur in the finding of the Subordinate Judge on this question and accept his reasons. The evidence adduced by the respondents is not sufficient to prove either a family or territorial custom and there is evidence in contradiction. It would appear that some zamindaries, mostly Oriya, have made provision for the maintenance of illegitimate children of members of their families, but even if the evidence could be regarded as being sufficient to prove a custom in Oriya zamindaries (these are now for the most part included in the Province of Orissa) it does not follow that such a custom exists in the Velama Zamindaries, which, as the Subordinate Judge has pointed out, are numerous in the Kistna, Godavari, Vizagapatam, Nellore and Chittoor districts of the Madras Presidency. In *Hurpurshad* v. *Sheo Dyal*[1], Sir Barnes Peacock in delivering the judgment of the Judicial Committee observed that a custom is a rule which in a particular family or in a particular district has from long usage obtained the force of law. It must be ancient, certain and reasonable and being in derogation of the general rules of law must be construed strictly. A custom in a

1. (1876) L.R, 3 I.A. 259 (P.C.).

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Hindu family to grant maintenance to illegitimate sons could not be regarded as being unreasonable. In fact the custom would only be following Hindu Law. But custom can only be relied on where it is ancient and certain and the evidence here falls very short of proving this. I have no hesitation in concurring in the finding of the learned Subordinate Judge that a custom has not been proved in the present case.

The question whether an illegitimate son is entitled under the Hindu law to maintenance out of an impartible estate is one of considerable difficulty as the authorities are not in agreement. The question of the right to maintenance of an illegitimate son of a member of a family owning a partible estate has in the main been settled by the decision of the Privy Council in *Vellaiyappa Chetty* v. *Natarajan*1. In that case a suit was instituted for past and future maintenance by the illegitimate sons and an illegitimate daughter of one P. M. A. Muthia Chetty, a Sudra by caste, by a continuous concubine. The father who was joint with his uncles and uncles' sons died leaving no separate estate, but the joint family possessed considerable properties. The Privy Council held that the illegitimate son of a Sudra by a continuous concubine has the status of a son and in such circumstances he is entitled as a member of the family to maintenance out of joint property in the hands of the collaterals. In delivering the judgment of the Privy Council, Sir Dinshah Mulla observed:

"On a consideration of the texts and the cases on the subject their Lordships are of opinion that the illegitimate son of a Sudra by a continuous concubine has the status of a son, and that he is a member of the family; that the share of inheritance given to him is not merely in lieu of maintenance, but in recognition of his status as a son; that where the father has left no separate property and no legitimate son, but was joint with his collaterals, as in the present case, the illegitimate son is not entitled to demand a partition of the joint family property in their hands, but he is entitled as a member of the family to maintenance out of that property; that his position in this respect is analogous to that of widows and disqualified heirs to whom the law allows maintenance because of their exclusion from inheritance and from a share on partition, and the Court may, as in their case, award not only future but also past maintenance so far as it is not barred by the law of limitation and may direct the same to be secured by a charge on the joint family property."

The right to maintenance of an illegitimate son of a Sudra was here recognised on the ground that he was a member of the joint family. Their Lordships, however, expressed no opinion

1. (1931) 61 M.L.J. 522: L.R. 58 I.A. 402: I.L.R. 55 Mad. 1 (P.C.).

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on the question whether an illegitimate son would have a right to maintenance out of joint family property if the father left separate property or if such property was not sufficient for his maintenance.

Until 1888 it was accepted that the Mitakshara did not permit the holder of an ancestral impartible estate to alienate it without regard to the interests of the joint family, but in that year in the case of *Rani Sartaj Kuari* v. *Rani Deoraj Kuari*[1] the Privy Council held that there was a right of alienation under the Mitakshara where there was a custom of primogeniture. It was said that the eldest son did not become a co-sharer with his father in the estate. In *Sri Raja Rao Venkata Surya Mahipathi Rama Krishna Rao Bahadur* v. *Court of Wards and Venkata Kumari Mahipathi Surya Rao*[2], which is known as the first *Pittapur case*, and in *Protap Chandra Deo* v. *Jagadish Chandra Deo*[3], the Privy Council held that the holder of an impartible Zemindari had the right to alienate it by will in the absence of a custom to the contrary. The first *Pittapur case*[2] resulted in the passing of an Act called the Madras Impartible Estates Act, 1902, to restrict the powers of alienation. This Act was replaced by the Madras Impartible Estates Act, 1904, which declares certain estates in this Presidency to be impartible—the Venkatagiri estate is one of them—and provides that the proprietor of an impartible estate shall be incapable of alienating it or binding it by his debts beyond his own lifetime, unless the alienation shall be made or the debt incurred under circumstances which would entitle the managing member of a joint Hindu family, not being the father or the grandfather of the other coparceners, to make an alienation of the joint property or incur a debt binding on the shares of the other coparceners independently of their consent. The Act also declares what are permissible alienations. It is not necessary to consider the provisions of the Act in this respect. All that need be said is that the decisions in *Sartaj Kuari's case*[1] and the first *Pittapur case*[2] are no longer effective in this Province so far as the estates mentioned in the Act are concerned. By the Madras Impartible Estates Second Amendment Act, 1934,

1. (1888) L.R. 15 I.A. 51: I.L.R. 10 All. 272 (P.C.).
2. (1899) 9 M.L.J. Supp. 1: L.R. 26 I.A. 83: I.L.R. 22 Mad. 383 (P.C.).
3. (1927) 53 M.L.J. 30: L.R. 54 I.A. 289: I.L.R. 54 Cal. 955 (P.C.).

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Ss. 9 to 15 were added to the Act of 1904. S. 9 mentions the persons who are entitled to maintenance out of an impartible estate governed by the Act. The respondents do not come within the section, but S. 12 declares that nothing contained in the Act shall affect the right to maintenance out of an impartible estate and the income thereof, of any other relations of the proprietor or any previous proprietor under any law or custom for the time being in force. Therefore the Act leaves untouched any rights which the respondents may have under Hindu law. In fact no contention to the contrary has been raised.

In *Rama Rao* v. *Rajah of Pittapur*[1] which is known as the second *Pittapur case*, the Judicial Committee considered the right to maintenance out of an impartible estate. The plaintiff had been adopted by the previous holder of the Pittapur zamindari. The late Rajah died leaving a will under which he bequeathed the estate to the defendant who claimed to be his *aurasa* son. The plaintiff did not admit that the respondent was the son of the late Rajah and averred that the estate had been the joint property of himself, his father and the late Rajah. On this basis he claimed to be maintained out of the estate. His claim was, however, disallowed. Lord Dunedin who delivered the judgment of their Lordships observed that the right to maintenance out of an impartible estate, so far as founded on or inseparable from the right of coparcenary began where coparcenary began and ceased where coparcenary ceased. An impartiable zamindari was the creature of custom, and it was of its essence that no coparcenary existed. This being so, the basis of the claim was gone, inasmuch as it was founded on the consideration that the plaintiff was a person who, if the zamindari were not impartible, would be entitled as of right to maintenance. This proposition did not negative the doctrine that there were members of the family entitled to maintenance in the case of an impartible zamindari. Just as impartibility was the creature of custom, so custom might and did affirm a right to maintenance in certain members of the family. The Board considered that the right of sons to maintenance in an impartible zamindari had been so often recognised that it would not be necessary to prove the custom in each case and expressly approved of the following passage from the judgment of the

1. (1918) 35 M.L.J. 392: L.R. 45 I.A. 148; I.L.R. 41 Mad. 778 (P.C.).

Calcutta High Court in *Nilmony Singh Deo* v. *Hingoo Lall Singh Deo*[1]:

"We can find no invariable or certain custom that any below the first generation from the last Rajah can claim maintenance as of right."

It was not necessary, however, for the purpose of deciding the second *Pittapur case*[2] to decide whether the right to maintenance of junior members of the family depended upon custom or to what extent custom had been proved and this was recognised in the next case to which I shall refer.

In *Baijnath Prashad Singh* v. *Tej Bali Singh*[3] which was decided three years after the second *Pittapur case*[2] the Judicial Committee had to consider the question of succession to an ancestral impartible estate in a joint Hindu family governed by the Mitakshara and it was held that succession followed the ordinary rule, the eldest member of the senior branch succeeding in preference to the direct lineal descendants of the common ancestor if the latter were more remote in degree. The judgment was delivered by Lord Dunedin and to use the language of Lord Blanesburgh in the *Collector of Gorakhpur* v. *Ram Sundar Mal*[4], it definitely negatived the view that the decision in *Sartaj Kuari's case*[5] and the first *Pittapur case*[6] were destructive of the doctrine that an impartible estate could be in any sense joint family property, a view apparently implied in these cases. It was recognised that an impartible zamindari could be the ancestral property of the joint family, but the person "to occupy the *Gaddi*" was the eldest of the senior branch. In the course of his judgment Lord Dunedin referred to the second *Pittapur case*[2] in these terms (page 211) :—

"Turning next to *Rama Rao* v. *Rajah of Pittapur*[2] it must be always remembered that the claim for maintenance as put forward was made, not against the head of the family of which the claimant was a member, but against the donee, who on the claimant's own allegation was a stranger to the family. It obviously could not, therefore, succeed unless it was of the nature of a real right. Now, it could only be of the nature of a real right, no proceedings having taken place before the estate got into the hands of the

1. (1879) I.L.R. 5 Cal. 256 at 259.
2. (1918) 35 M.L.J. 392: L.R. 45 I.A. 148: I.L.R. 41 Mad. 778 (P.C.).
3. (1921) 40 M.L.J. 387: L.R. 48 I.A. 195: I.L.R. 43 All. 228 (P.C.).
4. (1934) 67 M.L.J. 274: L.R. 61 I.A. 286: I.L.R. 56 All. 468 (P.C.).
5. (1888) L.R. 15 I.A. 51: I.L.R. 10 All. 272 (P.C.).
6. (1899) 9 M.L.J. Supp. 1: L.R. 26 I.A. 83: I.L.R. 22 Mad. 383 (P.C.).

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donee, if the maker of the claim had before that event been a person who was in some way an actual co-owner of the estate, and any observations which go to the question of maintenance apart from the question of real right may be treated as *obiter dicta*."

There is here a statement by Lord Dunedin himself that his observations in the second *Pittapur case*[1], which go to the question of maintenance "apart from the question of real right" might be treated as *obiter dicta.* Lord Dunedin in the course of his judgment referred to the right of junior members of a joint family ruled by the Mitakshara law down to three generations from the head of the family to maintenance until partition takes place. He also referred to those persons who by reason of personal disqualification are not allowed to inherit but are given maintenance in lieu—the idiot, the blind from birth, and the mad man—and to the class which is entitled to maintenance on the ground of personal relationship, namely, the widow, the parent and the infant child. It would appear that in using the words "apart from the question of real right" Lord Dunedin had in mind such rights as these. The judgment clearly recognised that an impartible zamindari could be regarded as the ancestral property of the joint family and therefore negatived the statement in the second *Pittapur case*[1], that it was of the essence of an impartible zamindari that no coparcenary existed.

The question of the right to maintenance out of an impartible estate was raised in *Pratap Chandra Deo* v. *Jagadish Chandra Deo*[2]. In this case the respondent brought a suit against the appellant claiming an estate known as the Dalbhum Raj and mesne profits, the claim being made under the will of the last holder. The family was undivided and governed by the Mitakshara. The estate was impartible and there was a custom of lineal primogeniture. The trial Court and the Calcutta High Court on appeal declared the respondent's title under the will, but held that the appellant who was a member of a junior branch of the family was entitled to maintenance out of the estate at the rate of Rs. 1,200 per mensem. Both parties appealed to the Privy Council which dismissed the appeal by the appellant, but allowed the respondent's appeal on two grounds, first on the ground that the maintenance of the

1. (1918) 35 M.L.J. 392: L.R. 45 I.A. 148: I.L.R. 41 Mad. 778 (P.C.).
2. (1927) 53 M.L.J. 30: L.R. 54 I.A. 289: I.L.R. 54 Cal. 955 (P.C.).

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appellant and his family was already provided for by a Khorposh (maintenance) grant of certain villages to his predecessors, which villages were still in his possession; and secondly on the ground that he had failed to establish a right to maintenance by custom or relationship or in any other way. The second ground was based on the remarks of Lord Dunedin in the second *Pittapur case*[1], without reference to what was said in *Baijnath Prashad Singh's case*[2]. The question was also referred to in *Shiba Prasad Singh* v. *Prayag Kumari Debi*[3], where Sir Dinshah Mulla in delivering the judgment of the Board said that in the case of ordinary joint family property the members of the family had: (1) the right of partition; (2) the right to restrain alienations by the head of the family except for necessity; (3) the right of maintenance; and (4) the right of survivorship. The first of these rights could not exist in the case of an impartible estate, though ancestral, from the very nature of the estate. The second was incompatible with the custom of impartibility, as laid down in *Sartaj Kuari's case*[4], and the first *Pittapur case*; and "so also the third, as held in the second *Pittapur case*". To this extent the general law of the Mitakshara had been superseded, and the impartible estate, though ancestral, was clothed with the incidents of self-acquired and separate property, but the right of survivorship was not inconsistent with the custom of impartibility, and still remained. Here again the second *Pittapur case* was followed without discussion.

If the question whether the respondents are entitled to maintenance under Hindu law is to be governed by the judgments in the second *Pittapur case*[1], *Protap Chandra Deo* v. *Jagadish Chandra Deo*[5] and *Shiba Prasad Singh* v. *Prayag Kumari Debi*[3], the answer must be adverse to them, but it is said that in its judgment in *Collector of Gorakhpur* v. *Ram Sundar Mal*[6], the Privy Council has re-stated the law with regard to maintenance and that the earlier cases which I have just mentioned are no longer binding on the Court in this

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1. (1918) 35 M.L.J. 392: L.R. 45 I A. 148: I.L.R 41 Mad. 778 (P.C.).
2. (1921) 40 M.L.J. 387: L.R. 48 I.A. 195: I.L.R. 43 All. 228 (P.C.),
3. (1932) 63 M.L.J. 196: L.R. 59 I.A. 331: I.L.R. 59 Cal. 1399 (P.C.).
4. (1888) L.R. 15 I.A. 51: I.L.R. 10 All. 272 (P.C.).
5. (1927) 53 M.L.J. 30: L.R. 54 I.A. 289: I.L.R. 54 Cal. 955 (P.C.).
6. (1934) 67 M.L.J. 274: L.R. 61 I.A. 286: I.L.R. 56 All. 468 (P.C.),

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connection. This statement appears to be well founded. In *Collector of Gorakhpur* v. *Ram Sundar Mal*[1], Lord Blanesburgh, after stating that the judgment of Lord Dunedin in *Baijnath Prasad Singh's case*[2], had definitely negatived the view that the decisions of the Board in *Sartaj Kuari's case*[3] and the first *Pittapur case*[4], were destructive of the doctrine that an impartible zamindari could be in any sense family property, went on to observe (page 302):—

"One result is at length clearly shown to be that there is no reason why the earlier judgments of the Board should not be followed, such as, for instance, the *Chellapalli case*[5], which regarded their right to maintenance, however limited, out of an impartible estate as being based upon the joint ownership of the junior members of the family, with the result that these members holding zamindari lands for maintenance could still be considered as joint in estate with the zamindar in possession."

Later in the judgment (page 303) Lord Blanesburgh said:

"The recent decisions of the Board constitute a further land mark in the judicial exposition of the question at issue here. While the power of the holder of an impartible raj to dispose of the same by deed (*Sartaj Kuari's case*[3]), or by will (the first *Pittapur case*[4]), *Protap Chandra Deo* v. *Jagadish Chandra Deo*[6], remains definitely established, the right of the junior branch to succeed by survivorship to the raj on the extinction of the senior branch has also been definitely and emphatically reaffirmed. Nor must this right be whittled away. It cannot be regarded as merely visionary. As pointed out in *Baijnath Prasad Singh's case*[7], when before the Allahabad High Court the junior members of a great zamindari enjoy a high degree of consideration being known as babus, the different branches holding babuana grants out of the zamindari. Their enjoyment of these grants is attributable to their membership of the joint family, and until the decisions above referred to beginning in 1888 supervened, they had no reason to believe that their right of succession were being imperilled by their estrangement from the zamindar in possession. Great caution must therefore be exercised in attributing any special consequences to conduct only significant in the light of these decisions now explained."

I read Lord Blanesburgh's judgment in this way. It recognises that the power of the holder of an impartible estate to dispose of it by deed or will has been definitely established, but at the same time it recognises that an impartible estate can be regarded as joint family property, giving the members of

1. (1934) 67 M.L.J. 274: L.R. 61 I.A. 286: I.L.R. 56 All. 468 (P.C.)
2. (1921) 40 M.L.J. 387: L.R. 48 I.A. 195: I.L.R. 43 All. 228 (P.C.).
3. (1888) L.R. 15 I.A. 51: I.L.R. 10 All. 272 (P.C.).
4. (1899) 9 M.L.J. Supp. 1: L.R. 26 I.A. 83: I.L.R. 22 Mad. 383 (P.C.).
5. (1900) 10 M.L.J. 294: L.R. 27 I.A. 161: I.L.R. 24 Mad. 147 (P.C.).
6. (1927) 53 M.L.J. 30: L.R. 54 I.A. 289: I.L.R. 54 Cal. 955 (P.C.).
7. (1916) I.L.R. 38 All. 590.

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the family a right to maintenance and a right in the junior branch to succeed by survivorship to the estate on the extinction of the senior branch and it leaves the way open to the Court to follow the decisions of the Board earlier than the second *Pittapur case*1 on questions relating to maintenance.

The reference by Lord Blanesburgh to the *Chellapalli case*2, is particularly significant. This was a consolidated appeal arising out of two separate suits for maintenance filed in the District Court of Kistna against the zamindar of Chellapalli by his two younger brothers respectively. The District Judge held that they were entitled to maintenance and to recover arrears for a period of 12 years. This Court on appeal agreed with the District Judge except as regards the arrears of maintenance. It held that the arrears were not claimable, except a certain sum received by the plaintiffs under a previous order of the Court and reduced the amount of arrears from Rs. 56,000 to Rs. 23,000. In delivering the judgment of the Judicial Committee Sir Henry De Villiers said:

"Their Lordships fully agree with the High Court that the family of the parties to the present action has not become a divided one in consequence of the proceedings in the previous suit to which reference has already been made. It is true that in that suit a decree was made for the partition of a portion of the family property, but it was a very inconsiderable portion, and had no relation whatsoever to the zamindari estate. As to the zamindari estate, this Board held that it was impartible, and the consequence is that the plaintiffs, as the younger brothers of the zamindar retain such right and interest in respect of maintenance as belong to the junior members of a raj or other impartible estate descendible to a single heir. See *Sartaj Kuari* v. *Deoraj Kuari*3. In regard to the amount of maintenance, the Judges of the High Court very properly refused to disturb the finding of the District Judge whose experience in the district they fully recognize."

The reference to maintenance to be found at page 62 of the report of *Sartaj Kuari's case* in 15 Indian Appeals consists of a quotation from the judgment in *Periasami* v. *Periasami*4, where mention is made of younger brothers "taking such right and interests in respect of maintenance and possible rights of succession as belong to the junior members of a raj or other impartible estate descendible to a single heir." The Board held that the plaintiffs had a right to maintenance and restored the finding of the District Judge that they were entitled to payment

1. (1918) 35 M.L.J. 392: L.R. 45 I.A. 148: I.L.R. 41 Mad. 778 (P.C.).
2. (1900) 10 M.L.J. 294: L.R. 27 I.A. 151: I.L.R. 24 Mad. 147 (P.C.).
3. (1888) L.R. 15 I.A. 51 at 62: I.L.R. 10 All. 272 at 285 (P.C.).
4. (1878) L.R. 5 I.A. 61: I.L.R. 1 Mad. 312 (P.C.).

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of the amount of arrears for twelve years. There is no reference to custom in the judgment and the decision can only be regarded as being based on the principles of Hindu Law.

The judgment in the *Collector of Gorakhpur* v. *Ram Sundar Mal*[1], is definite in regarding the right to maintenance of junior members of the family as being based upon joint ownership of the estate. But what significance is to be attached to the words "however limited" which Lord Blanesburgh used in conjunction with the right to maintenance? Where the Hindu Law gives a right to maintenance the right can only be affected by custom and I do not regard these words as recognising any limitation in principle, but only a possible limitation in a particular case.

Impartibility arises out of custom, but with the greatest respect to what has been said to the contrary I do not regard a custom of impartibility as in itself destroying the right of the junior members of the family to maintenance out of the family estate while it remains in the family. The fact that a family from generation to generation has agreed that the ancestral estate shall be held according to the law of primogeniture and thereby has allowed a custom of impartibility to arise does not in itself imply the abandonment by the junior members of their right to maintenance out of the estate. There is a vast difference in the giving up of a right to partition from the giving up of a right to maintenance. Impartibility may lead to enhancement of the prestige of the family and the preservation of the ancestral estate, but loyalty to the family does not demand the giving up of a right to maintenance. To deprive junior members of a joint Hindu family whether partible or impartible of the right to maintenance there must, it seems to me, be a custom to that effect. Of course if the estate lawfully passes into the hands of strangers the right to maintenance out of the estate will necessarily cease.

There is here no custom depriving junior members of the Venkatagiri family of the right to maintenance and it cannot be denied that the respondents are members of the family. The decision in *Vellaiyappa Chetty* v. *Natarajan*[2] definitely establishes this. In these circumstances I consider that the respondents are entitled under Hindu Law to maintenance out of the estate, if provision has not already been made for them. Has

1. (1934) 67 M.L.J. 274: L.R. 61 I.A. 286: I.L.R. 56 All. 468 (P.C.).
2. (1931) 61 M.L.J. 522: L.R. 58 I.A 402: I.L.R. 55 Mad. 1 (P.C.).

provision then been made for them? In my opinion it has not. It is true that under the deed of the 8th April, 1889, their father received large sums of money, but these were not paid to him for his maintenance or the maintenance of his family, nor has it been so suggested. Provision was made for maintenance in another part of the document but the provision was limited to him and his legitimate descendants.

It is next to be considered whether the fact that their father left a large estate makes any difference to the respondents' claim. In deciding *Vellaiyappa Chetty* v. *Natarajan*[1], the Judicial Committee left this question open and no Indian authority has been quoted to us on the subject. The question must then be decided on principle. If a person is entitled in law to be maintained out of an ancestral estate the possession of private property cannot destroy his right. The fact that he has private means may have bearing on the amount to be paid out of the estate, especially if the estate is a poor one, but that is all. The parties to the deed of the 8th April, 1889, in fact recognized this as in addition to the large sums which the younger brothers received under the deed separate provision was made in it for their maintenance. Accordingly I hold that the fact that their father left them a large fortune does not deprive the respondents of their right to maintenance out of the Venkatagiri Estate.

It remains to be considered what allowance should be granted to the respondents and whether they are entitled to be paid arrears. The Subordinate Judge considered that if maintenance were payable to the respondents under Hindu Law a fitting allowance would be Rs. 250 a month each, being half the amount they would have received had they been legitimate. The decisions of this Court in *Ananthayya* v. *Vishnu*[2] and *Rathinasabapathi Odayar* v. *Gopala Odayar*[3] to which the Subordinate Judge has referred in my opinion correctly state the basis for the assessment of the amount. It is not a matter of granting a compassionate allowance. The amount must be fixed with regard to the position of the family. An illegitimate son will not in the ordinary course occupy so prominent a position as a legitimate son and the rule that an illegitimate son of a Sudra is only entitled to half of what a legitimate son is entitled to in his father's estate may be taken as a guide in fixing the amount of

1. (1931) 61 M.L.J. 522: L.R. 58 I.A. 402: I.L.R. 55 Mad. 1 (P.C.).
2. (1893) I.L.R. 17 Mad. 160. 3. (1928) 56 M.L.J. 673.

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his allowance for maintenance. I see no reason why the conclusion of the Subordinate Judge should not be accepted and therefore I concur in his finding that a reasonable allowance is Rs. 250 per mensem for each of the respondents.

I also agree with the Subordinate Judge that the respondents are entitled to an allowance for maintenance from the date of their father's death. That date is within the period of limitation and the fact that they were ignorant of their rights—it has not been suggested that their explanation of the delay in the filing of the suit should not be accepted—is not sufficient reason for depriving them of what has accrued. In the *Chellapalli case*[1], it was observed that if the defendant had been misled into the belief that the claim for maintenance had been abandoned and had in consequence not set aside any portion of his annual income to meet the claim he might have had a good defence to the action, but without some such ground of defence it was impossible to hold that the younger brothers had forfeited an undoubted right merely because they had in the first instance been advised to file a wrong suit and had not claimed maintenance as it fell due. In the present case the appellant does not say that he has been misled by the delay and the defence has been confined to denying the right of the respondents to claim maintenance.

It follows that in my opinion the decree of the trial Court should be varied by the reduction of the aggregate monthly allowance from Rs. 1,000 per mensem to Rs. 500 per mensem and that the arrears should be calculated at the rate of Rs. 500 and not Rs. 1,000 per mensem. It is conceded that if the respondents are entitled to a decree they are entitled to have the amounts payable to them charged upon the estate, and an order to this effect will be embodied in the decree.

I consider that the respondents are entitled to costs in the lower Court and in this Court based on the amount awarded to them under the decree of this Court, they having succeeded on the Hindu Law issue. The appellant has succeeded on the issue with regard to the deed and the appeal has resulted in a substantial reduction of the amount payable. In these circumstances I hold that he is entitled to costs in this Court based on the difference in the amount payable under the decree of the trial Court and the amount payable under the decree of this Court.

1. (1900) 10 M.L.J. 294: L.R. 27 I.A. 151: I.L.R. 24 Mad. 147 (P.C.).

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Krishna-swami Aiyangar, J.

Krishnaswami Aiyangar, J.—I concur in the judgment just now pronounced by my Lord the Chief Justice, which I have had the advantage of reading before hand. In view however of the importance of the questions raised, I would, with respect, add a separate judgment of my own, embodying my reasons for agreeing with the conclusions arrived at by my Lord. Of the points raised in the appeal, two alone appear to my mind to be the most material, and to them accordingly I shall confine my observations.

The first of them is the correct interpretation of the deed of settlement. The whole controversy on this point turns on the meaning of the expression *purusha santhathi*, occurring in that part of the deed where provision is made for payment of a maintenance allowance to the descendants of Sri Venugopal. The respondents are his Dasi putras, that is, illegitimate sons according to Hindu Law. The controversial sentence is as follows:—

"After the life of the said Sri Venugopala Krishna Yachendrulu, his *purusha santhathi*, shall, in perpetuity, be paid the same allowance amount, that is, at the rate of Rupees One Thousand (Rs. 1,000) per month in the above manner."

Purusha santhathi is a Sanskrit expression, but commonly used in its original sense in most of the vernaculars of the Presidency. It is a compound of two words, *purusha* meaning male, and *santhathi* meaning issue, progeny or descendants. The expression may accordingly be rendered into 'male descendants' or 'male issue'. So far, both sides argee; but they vitally differ on the question whether the expression comprehends legitimate issue only, or whether, as held by the learned Subordinate Judge, it includes both legitimate and illegitimate issue. In spite of the somewhat emphatic language in which the Subordinate Judge has expressed himself we have been obliged on a careful consideration of the document in the light of the surrounding circumstances, to differ from him. It is complained, and I think rightly, that the learned Judge has paid undue and unjustifiable attention to the heirship of illegitimate sons under Hindu Law, instead of regarding it as one only of the several circumstances to be taken into account for ascertaining the intention. The true office of all construction is to discover the intention of the parties, as expressed by the words used. Where those words are not sufficiently clear in themselves to fix

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the intention, the circumstances that surrounded the transaction, may and ought to be resorted to, to see if what is not apparent in the document in itself, is made clear by a knowledge of those circumstances. The law by which the parties are governed may afford a guidance, as with its aid, it may be possible to ascertain what the executant was aiming at. But caution is necessary in its use, in order to avoid over emphasising what is after all but one of the several factors to be considered. One may even say that by itself, it is not of much value. In fact its significance, where it is of value, lies in the light it sheds on the motives and objects, the aims and purposes which prompted the execution of the document, or the choice of the objects of the executant's bounty. As observed by the Privy Council in the case of *Mahomed Shumsool Hooda* v. *Shewukram*[1]:

"In construing the will of a Hindu it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property."

A knowledge of the law is valuable because it may afford a knowledge of the notions and wishes and through them lead to a discovery of the intention of the parties. In an early decision of the Board *Sreemutty Soorjeemoney Dossee* v. *Denobundoo Mullick*[2], it was observed:

"In determining that construction, what we must look to, is the intention of the testator. The Hindu Law, no less than the English Law, points to the intention as the element by which we are to be guided in determining the effect of a testamentary disposition; nor, so far as we are aware, is there any difference between the one law and the other as to the materials from which the intention is to be collected. Primarily the words of the will are to be considered. They convey the expression of the testator's wishes; but the meaning to be attached to them may be affected by surrounding circumstances, and where this is the case those circumstances no doubt must be regarded. Amongst the circumstances thus to be regarded, is the law of the country under which the will is made and its dispositions are to be carried out. If that law has attached to particular words a particular meaning, or to a particular disposition a particular effect, it must be assumed that the testator, in the dispositions which he has made, had regard to that meaning or to that effect, unless the language of the will or the surrounding circumstances displace that assumption."

That it is wrong to lay too much emphasis on the law as such is conveyed clearly enough in the language used by their Lordships in the Balarampur case *Sher Bahadur Singh* v. *Ganga*

1. (1874) L.R. 2 I.A. 7 at 14: 22 W.R. 409 (P.C.).
2. (1857) 6 M.I.A. 526 at 550, 551: 4 W.R. 114 (P.C.).

Bakhsh Singh[1], where again their Lordships observe:

"The matter for decision in this case being in the construction of a codicil to the Maharaja's will, the point is not what is the strict rule of the Hindu religion, or the strict rule of the Chhattri caste," (and if I may with respect add, the strict rule of the Hindu Law either) "but this, namely, what were the wishes and intentions of the testator as revealed by the language of that instrument, viewed through the light of surrounding circumstances."

It may happen that the executant in a particular case was anxious to perpetuate a rule of succession according to a particular system of law, and where this is the case, the rules of that law may assume paramount importance. This is exactly what occurred in the case cited as the following further observations make it clear

"The testator must have had in mind some law or rule which would apply to fix the succession. What law could this high caste Hindu possibly *have had in mind* for such a purpose other than the Hindu Law?"

The italics are mine. The rule of Hindu Law which excludes illegitimate sons from heirship in the case of twice-born Hindus was held in this case to determine the meaning of the word *aulad* (=issue) in a gift to an illegitimate son and his *aulad*. Their Lordships explain the reason for their decision as follows:—

"It would be strange indeed if the man who had made it his special care to treat this son of his as a Hindu" (he was in fact an illegitimate son by a Mahomedan mistress) "and had succeeded in marrying him to two high caste women, *should intend or desire*, whatever might be the strict letter of the law to place the offspring of these unions on the same level as the illegitimate children of his son's Mahomedan mistress and make them all equally the objects of his bounty."

From first to last, and all throughout, the quest is to be for the intention behind the language, whatever the aids resorted to. In fact, even in the Balarampur case itself the testator was conducting himself in a way contrary to the injunctions of the Hindu Law in that he treated and wanted others to treat, his illegitimate son by a Mahomedan mistress as if he were a legitimately born Hindu, and it was this conduct which primarily disclosed his true intention.

Can it be said that the Hindu Law of illegitimate succession furnishes in this case a clue to the intention behind the use of the expression *purusha santhathi*? Where Hindu Law and Hindu sentiment coincide, the law would of course be of help. Where they diverge however, it is the Hindu sentiment that

1. (1913) 26 M.L.J. 291; L.R. 41 I.A. 1; I.L.R. 36 All. 101 (P.C.).

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will rule even to exclusion of the law. The truth of the matter is that there can be little room for doubt that the ordinary notions of a Hindu towards irregular unions and the issue of such unions are not different from those of any other community. There is no denying it that the Hindu religion does not countenance extra-marital relations, and the Hindu Law itself looks down with disfavour on illegitimate children, assigning to them only a subordinate rank among the Sudras, and denying heirship altogether among the superior castes. It is therefore to the sentiments generally prevalent in the society to which the executant belongs, more than to the law that regard should be had in questions of this kind. Illicit relations are, until callousness overtakes the parties, carried on on the sly and rarely if ever owned, much less paraded in the public eye. The higher the social rank, the greater the care with which the veil is thrown over them. It is one thing to provide for the issue of a lapse that has occurred. Duty and honour may dictate it. Love and affection, more especially if there be no legitimate children may even prompt it. But I refuse to believe that a member of the Hindu community, nobleman or commoner, would contemplate with equanimity the possibility of future lapses either in himself or in his descendants and sit down on a solemn occasion to enact a scheme of succession admitting future illegitimate issue to its benefit. Yet, this is in effect the logical consequence of the view taken by the learned Subordinate Judge. He sums up the position in these words:

"The position therefore to my mind seems incontrovertible that the term *santhathi* when it is used in a document to which Sudras are parties intending to create thereby rights in favour of their *santhathi*, within that expression are comprehended both legitimate and illegitimate *santhathi*. In other words *purusha santhathi* of Raja Venugopal would include his illegitimate sons, *viz*., the plaintiffs."

The vice of the argument lies in attributing to the members of this proud ancient family of hereditary noblemen, an intention out of keeping with their lineage and social standing, and out of joint with the solemnity of what was in all probability the first occasion when they were recording a family usage of impartibility at a family council at which all members of the family including the old and respected father Sri Kumara Yachama were present. I must positively decline to accept the proposition of the Subordinate Judge that so far as the generic term *santhathi* is concerned,

which means issue, children or descendants, it must be held when used by Sudras to include children both legitimate and illegitimate. It would be almost grotesque to imagine that the executants of this settlement foresaw the likelihood of illegitimate issue being begotten not only by the adult brothers, one of whom was yet unmarried but also by Raja Venugopal who was at the time a boy of but tender years. It is satisfactory however to note that this suggestion was not advanced either in the Court below or here.

As I have said, the occasion was scarcely of a kind at which a question of illegitimate succession is likely to have been thought of or provided for. It is perhaps worthwhile in this connection to mention a circumstance not wholly devoid of significance. Sri Kumara Yachama, it is said, had illegitimate offspring, but the document is entirely silent about them. If a provision for their maintenance had been made, it must have been made privately, and if not it must have been reserved for private settlement later. Delicate personal affairs of the kind would scarcely be dragged into public view, or dealt with at a general settlement of family matters. It is also not without significance that marriage portions suitable to their condition in life have been separately provided for in the settlement deed for the two brothers, Sri Rajah Venkata Krishna and Sri Rajah Venugopal, who were yet young and unmarried, with a view to their entering into lawful wedlock in due time. If I may say so with respect, I fully endorse the opinion expressed by Krishnan Pandalai, J., in *Subramani Chetty* v. *Mahalakshmi Ammal*[1], which I think furnishes the basis for a correct approach to the question. I may add that the views expressed by that learned Judge are so much in accordance with prevailing sentiment, that they merited better consideration at the hands of the learned Subordinate Judge than he has chosen to give them.

Even apart from these considerations, I agree with the learned Chief Justice that there is sufficient in the language of the document itself, to hold that the words *purusha santhathi* which are by no means to be regarded as terms of technical legal import, were not intended to be used in a comprehensive sense so as to include both legitimate and illegitimate children as held by the Subordinate Judge. The Subordinate Judge seems

1. A.I.R. 1933 Mad. 659.

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to suggest that there is a distinction in the mode of construction between a will and a settlement. If I understand him aright, he seems to be of the opinion that the deed has to be scrutinised not from the background of approach proper for a gift or a will, but rather on the footing that it evidences a recognition by the eldest brother of pre-existing rights in the younger in consideration of the latter in their turn conceding the impartibility of the estate; in other words, they are not to be regarded as mere volunteers but rather as persons possessing definite rights which the eldest brother was bound to respect. Assuming this to be right, I still fail, to understand how this aspect of the matter provides 'a definite point from which we have to start'. It is unfortunate that the learned Judge has not been more explicit, and we are consequently obliged to labour more or less in the dark as to the precise nature and effect of the distinction which he seems to have had in mind, and the manner in which that distinction has influenced his judgment. For myself, I cannot see why the younger brothers should be regarded as having made a great concession, as it is improbable to a degree, that they or any of them could have seriously believed in the partibility of the estate. In fact, as the deed itself shows, they meekly acknowledged the impartibility of the estate receiving only a share in the cash and jewels, a sum of money for the purchase of a residential house, an inconsiderable marriage provision and a moderate maintenance allowance. I am unable to see how the fact that it is a deed of settlement and not a will or a gift advances the case of the respondents. I do not know, I can only suspect it, if the learned Judge by his reference to rights and obligations in this context is laying a foundation for the view that the brothers were in a position to extract and did in fact extract from the Raja a recognition of a heritable right in the allowance, similar in character and descendibility, to ordinary heritable property and capable therefore of being taken by issue legitimate as well as illegitimate. If so, I am afraid he must have carried a second error into the construction of the document.

Now, coming to the words *purusha santhathi* themselves. The word *santhathi* would ordinarily denote legitimate progeny only. If a sufficient expression of intention to the contrary is contained in the document, or is capable of being otherwise collected from it, the word will not by itself exclude the possi-

bility of illegitimate issue coming in, as there is nothing in its etymological sense against such an extension. In current language however, when a person, be he Sudra or a twice born, uses the word he would rarely indeed intend it to denote illegitimate issue. The *prima facie* meaning of *santhathi* as of 'children' being legitimate children that meaning is the one to be attached to it in the spoken as well as in the written word. Where however the word is used as a word of limitation, heirs in general would be indicated by it, and an illegitimate son where he happens to be an heir will no doubt come in. In other words, law will bring in the illegitimate son as an heir, if a party is found to have left the law to regulate the succession, and does not trouble to regulate it himself.

The decisions noticed by the learned Subordinate Judge in this context are of little value as in those cases the word has only been held to include collaterals or heirs in general, though *santhathi* in its literal sense may refer to lineal descendants. No decision has been cited in support of the contention that *santhathi* includes illegitimate descendants in the absence of something definite in the deed or in the surrounding circumstances showing that it was the intention of the executant to use the term in that special sense. In other words the *prima facie* meaning cannot be made to yield to and make way for another and a possible meaning in the absence of an overriding context or of surrounding circumstances of sufficient strength. But that is not the case here. On the contrary it is the primary meaning that I think holds the field to the end. So much for the meaning of the words without reference to the context.

A consideration of the language of certain of the clauses of the deed also leads to the same conclusion. In the first place, in no part of the document is there anything against the natural *prima facie* meaning of the word. What there is, tends only to support it. In the operative portion of cl. 2 of the deed, the words *purusha santhathi* are used to indicate the devolution of the estate after the eldest brother Sri Raja Rajagopala, his son and son's son, and it is in the highest degree unlikely that any but legitimate issue would have been here envisaged or meant. As I have said it is difficult to imagine that the members of this family would have contemplated the possibility of the failure of legitimate issue in all the four branches. If in this clause *purusha santhathi* bears the meaning of legitimate issue,

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as I think it did, the same meaning should be attributed to the expression in other parts of the deed as well. It would be wrong to give different meanings to the same expression in different parts of the same document, unless the context demands it. It will be seen however that the contrary intention is plainly shown by two other clauses to be found later in the document.

In referring to the events on the happening of which, the estate is to devolve on the next senior line. it is worthy of note, that the devolution is made conditional on the absence of the aurasa or the adopted son only, suggesting that the existence of an illegitimate son would not make a difference; whereas if the respondents' argument is right, the collaterals cannot succeed to the estate if there is in existence an illegitimate son. The learned Judge considers that the use of the word 'members' in the clause 'subject only to the condition of paying allowance to the other *members* of our family suitably to their respective status' suggests the inclusion of illegitimate children. Illegitimate sons may be members of the family according to the law, but there does not appear anything in the context to suggest that the word 'members' was consciously used or could have been used in the document so as to include illegitimate sons. Here again the learned Judge is obsessed with the membership of the illegitimate son under the law, and has failed to address himself sufficiently to the question of what the intention of the parties is likely to have been. It is doubtful if they were cognizant of the membership theory at all which does not appear to have been clearly grasped even by the Courts at the date of the document. Neither party has suggested that the assistance of a trained lawyer was requisitioned for the preparation of the document and there is no reason to think that the word 'members' while it may include females, was intended to bring in illegitimate offspring. It is equally profitless to regard the reference to the rules of Hindu Law in certain passages as lending support to the contention that except in regard to his amount, the allowance was to follow the line of descent laid down by that law. This is merely to give effect again to the law, and not to the intention.

It is with the portion of cl. 5 extracted in the beginning of this judgment that we are directly concerned. On that clause the respondents almost solely found their case in support of a

construction favourable to them. After setting out correctly the rule governing the construction of documents, the Subordinate Judge asks himself the question "whether there is so strong a probability of intention to exclude or not to include, the illegitimate sons of the junior brothers, or that a contrary intention cannot be supposed, because we are *now* discussing the question *on the footing* that the expression '*purusha santhathi*' *prima facie* connotes both legitimate and illegitimate children." The italics are mine. He thus starts with a wrong premise, for as I have endeavoured to explain, this is neither the *prima facie* meaning of the expression as ordinarily spoken or understood, nor do the surrounding circumstances so far as I can see point to this being the sense in which the parties could be deemed to have used it. In fact he assumes that the words include illegitimate children, and proceeds to examine the language of the document for the purpose of seeing if there is anything in it against such a pre-determined meaning. On account of this wrong approach, the judgment loses a great deal of the value that would otherwise belong to it.

What appears to be a decisive argument against the Subordinate Judge's view is contained in two other clauses of the deed, where the words *purusha santhathi* is followed by the expression *either by way of aurasa, or by way of adoption.* In the one, it is provided that on the death of any male member in any of the three branches *without purusha santhathi either by way of aurasa or by way of adoption,* the allowance should go to the *gnatis* nearest to him in his own branch according to Hindu Law. By the second, it is directed that on the extinction of any of the three branches by the total absence (that is, completely) of *purusha santhathi* either by way of aurasa or by adoption, the allowance which was being paid to that branch should be stopped to the extent of a half alone, namely, Rs. 500 being payable as maintenance for life to the widow or widows of the last person in the branch who died without *purusha santhathi.* The italicized words either by way of aurasa or by way of adoption in those clauses do seem to explain when according to the deed a person is to be regarded as dying without *purusha santhathi.* That event in the language of the parties themselves happens, when he should die without male issue either by way of aurasa or by way of adoption. In *aurasa* we have once again a word whose strict etymological import is perhaps

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wider than its ordinary or even legal meaning. The etymological meaning is "produced from the breast, born of oneself, or legitimate." But whatever its literal meaning, it is clear that both Manu and Yagnyavalkya define the word as denoting the son born of lawful wedlock only. According to Manu, Chap. IX, 166:

स्वेक्षेत्रे संस्कृतायां तु स्वयमुत्पादयेद्धि यम् ।
तमौरसं विजानीयात् पुत्रं प्रथमकल्पितम् ॥

Chapter II, 128:

औरसो धर्मपत्नीजः तत्समः पुत्रिकासुतः ।*

"Whoever is begotten by a man himself on a lawfully married (purified by marriage) wife of his own, he should be known as an aurasa son regarded as the foremost among sons."

Yagnavalkya is still more explicit. An aurasa (son) is he who is produced by a Dharma Patni (lawfully wedded wife). This is in fact how the word is also commonly understood, *Sadu* v. *Baiza and Genu*1 and *Subramania Aiyar* v. *Rathnavelu Chetty*2. All doubt is completely dispelled by the use of the word along with and in contrast to, an adopted son in the phrase 'by way of aurasa or by way of adoption.' In this collocation, aurasa can only mean legitimate son, and this is not disputed. If this view is correct, it would necessarily follow that the existence of an illegitimate son notwithstanding, the allowance would, in the one case, pass over to the nearest collaterals (*gnatis*) in the branch, and in the other be partially stopped, if there be neither a legitimate nor an adopted son. The illegitimate son is thus left out of account, and the whole scheme of devolution is built up, it seems to me, by taking into account legitimate descendants only. In the light to this explanation which is found in the document itself, it is not permissible to overlook the meaning suggested by it in favour of any other meaning. The learned Judge does not deal with this point directly but goes on to consider the meaning of the word *gnatis* occurring in the first of these clauses which word, according to him, includes illegitimate sons also. He then goes on to hold that on failure of the legitimate or adopted son, the *gnatis* including the illegitimate son would take the allowance, and thus the illegitimate son is left in after the aurasa and the adopted sons

1. (1878) I.L.R. 4 Bom. 37 (F.B.).
2. (1916) 33 M.L.J. 224: I.L.R. 41 Mad. 44 (F.B.).
* Yagnavalkya.

by the use of the word *gnati*. Here again the learned Judge has not taken the ordinary colloquial meaning of a word in constant use. *Gnati* is rendered as agnate, which term again the official interpreter rightly explained as referring to collateral agnatic relations. It is unusual to refer to a brother as a gnati in a joint family though again in Sanskrit the word does include a brother also. The question in reality is not whether an illegitimate brother is a gnati or not for purposes of succession, but whether the word is used in that unusual sense in the deed. Before us, however the argument mainly was that this clause has no application, as the case is governed by the earlier clause referred to already, but we are unable to shut our eyes to an interpretation which the document itself furnishes.

As regards the second of the clauses above referred to the extinction of the branch takes place by the total cessation of male descendants either by way of aurasa or by adoption, and, it is to be noted, in spite of the possible existence of illegitimate sons as in the previous clause. On this clause two answers are attempted in the judgment of the Subordinate Judge, both of which however appear to be laboured and unconvincing. He thinks that the use of the word 'completely' which is the same as the word 'total' in the official translation, shows that the use of the words 'aurasa' or 'adopted' were merely illustrative and so they do not exclude the illegitimate issue. He also goes back to the first clause, where the expression by way of aurasa or by adoption does not accompany the word *purusha santhathi* and says, 'Mr. Srinivasa Aiyangar, plaintiff's counsel, further argued that if the intention was to restrict the applicability of the term *purusha santhathi* only to legitimate progeny, either born or adopted in the first clause itself which contains the disposition to *purusha santhathi* of Raja Venugopal the qualifying words aurasa or adopted would have been used in that clause alone. This certainly is an argument, the force of which it is difficult to minimise.' For my part I am unable to see much force in that argument. Indeed in the light of the knowledge gained by a consideration of the later clauses, it is easy to understand the true meaning of the words *purusha santhathi* wherever they occur, even if they are not accompanied by the phrase *aurasa* or adopted son. The earlier clause would thus receive a meaning to which no reasonable exception could be taken. I may perhaps in this connection refer to the rule of construction

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under the English Law stated by Cotton, L. J., in a form [*Megson* v. *Hindle*1], specially appropriate even to another and a different system which unlike that system, recognises a limited right of heirship in the illegitimate son. He says:

"To take a case out of the common rule that only legitimate children can take under a gift to 'children' there must be on the face of the will such a strong probability of the testator's intending to include illegitimate children that a contrary intention cannot be imputed to him."

If we substitute *purusha santhathi* for 'children' in this passage, we have a statement of the law which eminently fits into this case. I do not understand the Privy Council as laying down the law differently in the Balrampur case, *Sher Bahadur* v. *Ganga Bakhsh*2, where they meant, I think, merely to illustrate the proposition that the presence of special circumstances may lead to a different conclusion. S. 100 of the Succession Act may also be remembered in this connection

I regret I am unable to attach weight to most of the considerations which have weighed with the learned Subordinate Judge in his construction of the deed of settlement, and accordingly feel constrained to differ from him. The deed does not, and I think, was not intended to, confer rights on illegitimate sons, whose rights if any must be sought elsewhere, namely, the Hindu Law.

The second contention urged by the learned Counsel for the respondents is that under the Hindu Law and apart from the deed of settlement, the respondents who are the illegitimate sons of Sri Raja Venugopal are entitled to maintenance out of the impartible estate. The learned Subordinate Judge did not accede to this contention. But as we are of a different opinion, it is necessary to go into this question in some detail. The subject is one of considerable complexity and difficulty on account of the vicissitudes which have attended the course of decisions regarding the basic principles of the law relating to impartible estates. It is only fair to say that we would have had a great deal of difficulty in arriving at the conclusion at which we have arrived but for the latest pronouncement of the Judicial Committee in *The Collector of Gorakhpur* v. *Ram Sundar Mal*3. The clear light which this decision has thrown

1. (1880) 15 Ch. D. 198 at 205.
2. (1913) 26 M.L.J. 291: L.R. 41 I.A. 1: I.L.R. 36 All. 101 at 121, 122 (P.C.).
3. (1934) 67 M.L.J. 274: L.R. 61 I.A. 286: I.L.R. 56 All. 468 (P.C.).

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on the subject has dispelled all doubts as to the law that we are bound to apply to the decision of this case.

The paternity of the respondents is not now disputed. Nor is it disputed that they fulfil the description of *Dasi Putras* in Hindu Law, capable of inheriting to their putative father Raja Venugopal. The Venkatagiri family of which Raja Venugopal was a member belong to the Velama community, a subdivision of the Sudra caste amongst Hindus. The estate is by custom impartible and descendible to the eldest representative in the eldest line according to the rules of lineal primogeniture. The appellant has conceded that it is held as joint family property, a concession which has been recorded by the learned Judge and not questioned in the appeal. His contention is that under the Hindu Law the junior members in a joint family of which the senior member alone is the sole holder of an impartible estate, have no right apart from custom to be maintained out of the estate or its income. Proof of the custom would not, of course, be insisted if the claimant were a brother or son, as in such a case the custom has been so often judicially noticed that it is no longer necessary to adduce proof of it. *Rama Rao* v. *Rajah of Pittapur*[1]. But if the claimant is a more distant relation, he must, it is argued, make out a custom entitling him to maintenance, before he can succeed.

The right of illegitimate sons to maintenance out of the partible assets of the joint family to which he belongs has now been finally settled by the decision of the Privy Council in *Vellaiyappa Chetty* v. *Natarajan*[2]. The relevant passage in their Lordships' judgment has been extracted in the judgment of my Lord. That passage, if I may say so with respect, is clear and telling, and has finally set at rest all controversy regarding the jural basis of an illegitimate son's right of maintenance under the Hindu Law. It is now established that that right springs out of his membership of the putative father's family, a membership which necessarily carries with it a legal right to be maintained out of the common assets. Where the family consists of illegitimate and legitimate sons and no collaterals, his rights are higher, but this aspect of his rights is of no materiality in this case. As held in *Rama Rao* v. *Rajah of Pittapur*[1], the second Pittapur case the right of coparceners to

1. (1918) 35 M.L.J. 392: L.R. 45 I.A. 148, 155: I.L.R. 41 Mad. 778 (P.C).
2. (1931) 61 M.L.J. 522: L.R. 58 I.A. 402: I.L.R. 55 Mad. 1 (P.C).

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maintenance out of the coparcenary property is an inherent quality of that property. What was described in this case as the inherent quality of the coparcenary property as regards a full coparcener, has, it seems to me, been extended by *Vellaiyappa Chetty's case*[1] to an illegitimate son by reason of his membership of the family, though his membership is inferior to that of a legitimately born son.

To this extent the right of the illegitimate son is practically conceded. The Subordinate Judge appears to accept the position so far; for he has said:

> "If in the present case, the claim for maintenance, let us assume, had been directed against not impartible property, but against partible property, then clearly, if the plaintiff's father Raja Venugopal had left no separate property, since he left no legitimate issue (in fact he died unmarried) the plaintiffs would clearly be entitled, according to *Vellaiyappa Chetty* v. *Natarajan*[1] to maintenance from the defendant who is their collateral, in possession of the joint family property."

The qualification mentioned here and having reference to the separate property of the putative father is the matter on which their Lordships did not and were not called upon to express an opinion. This question does arise for consideration in the present case as admittedly the father has died leaving considerable separate property which has passed into the hands of the respondents under his will.

It is, however, difficult to see how this circumstance can operate to deprive them of their right to be maintained out of the estate, if otherwise they have the right. They have the right because they are members of the family, and the right will subsist so long as the membership continues. Neither their status as members nor their right to maintenance which is a consequence of that status can be imperilled by the accident of their coming into possession of the separate property of the father. What was urged was that even if the right be held to exist, yet the very nature of that right is such, that effect should not be given to it where the claimant is well supplied in this regard from other sources. In other words there is no need to maintain persons who are already well maintained by others or from other sources. The correctness of this proposition was examined by this Court in *Lingayya* v. *Kanakamma*[2] and

1. (1931) 61 M.L.J. 522: L.R. 58 I.A. 402: I.L.R. 55 Mad. 1 (P.C.).
2. (1913) 28 M.L.J. 260: I.L.R. 38 Mad. 153.

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Kodandarami Reddi v. *Chenchammal*[1] and the conclusion was reached that it is unsound. Both these cases related to a claim by the widow of a deceased coparcener, but the decision must be held to govern the present case as the basis of the claim whether it is by a widow or by an illegitimate son, is identical. I may also mention that on this point the Subordinate Judge has himself come to the same conclusion.

The question then is whether there is any difference in the principle to be applied because it is not partible property but an impartible estate against which the maintenance is claimed. Illegitimacy by itself being no longer after *Vellaiyappa Chetty's case*[2], an obstacle to the recognition of maintenance rights, the question narrows itself to this; is there anything in the nature or incidents of an impartible estate, anything so special and peculiar that it necessarily displaces the junior member's right to maintenance, which is, as the Privy Council described it, an inherent quality of common property? The learned Subordinate Judge is of the opinion that the difficulty lies not in the respondents being of illegitimate descent, but in their being beyond the admissible degree of relationship. The contention of the learned Counsel for the appellant on this point was almost entirely founded on the decision of the Privy Council in the second *Pittapur case*[3]. According to him this decision of the Privy Council concludes the question against the respondent and in favour of the appellant. On the other hand it is contended for the respondents, that the authority of this case has been greatly circumscribed, and must now be regarded as confined to the actual decision contained in it and no more.

It is therefore necessary to examine the soundness of this argument, and to see whether there is in the later cases an exposition of principle at variance with what appears to be stated in the second *Pittapur case*[3]. That case related to a claim to maintenance by the son of the adopted son of the last holder of the Pittapur estate, an impartible zamindary in the Northern Circars. The estate was held by a devisee under the will of the last holder, who claimed to be the aurasa son. The sonship had been denied by the claimants' father and was also

1. (1929) 59 M.L.J. 531.
2. (1931) 61 M.L.J. 522: L.R. 58 I.A. 402: I L R. 55 Mad. 1 (P.C.).
3. (1918) 35 M.L.J. 392: L.R. 45 I.A. 148: I.L.R. 41 Mad. 778 (P.C.).

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denied by the claimant, and the claim was made to rest on an allegation of co-ownership with the last holder, which was not affected, it was urged, by the estate getting into the hands of a stranger under the will. The claim was rejected. The plaintiff did not attempt to prove that there was any custom affecting this zamindari which enjoined the making of grants to any persons, nor did he put his case on any claim resting on relationship. It was by reference to the general law, that he attempted to sustain the claim, by suggesting that that law cast a real, and not a mere personal burden which followed the property into whose soever's hands it passed. This was a patently extravagant proposition as the burden does not become real, until the estate is charged by act of parties or by decree of Court. In rejecting the claim, their Lordships held, as the concluding paragraph of the judgment shows, that a claim of the kind not based on relationship must fail, quoting the following extract from Sankaran Nair, J.'s judgment in the High Court:

> "The plaintiff does not advance any claim based on relationship. He refuses to admit any relationship . . . . As there was no community of interest the property is not burdened with his claim in the hands of a donee."

This passage does suggest that their Lordships threw out the claim on both grounds, namely, the absence of relationship, and the absence of co-ownership. In fact the greater part of the judgment is devoted to the discussion of the question whether there was in law a coparcenary in respect of an impartible estate. At pages 153 and 154 the following observations occur:

> "It is settled that in an impartible zamindari there is no coparcenary, and consequently no person existed who as coparcener could object to alienation of the whole subject by the *de facto* and *de jure* holder." "It follows that the right to maintenance, so far as founded on or inseparable from the right of coparcenary, begins where coparcenary begins and ceases where coparcenary ceases" . . . . "An impartible zamindari is the creature of custom, and it is of its essence that no coparcenary exists. This being so, the basis of the claim is gone, inasmuch as it is founded on the consideration that the plaintiff is a person who, if the zamindari were not impartible, would be entitled as of right to maintenance."

These observations, there can be no doubt, *prima facie* do touch and govern the principle of the law to be applied in the present case, and they appear to negative the possibility of a coparcenary in relation to an impartible estate. In fact they

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embody the logic underlying the decisions of the Privy Council in *Sartaj Kuari's case*[1] and the first *Pittapur case*[2] and this Court would have been powerless to pass them by, but for the latter decisions of the Board. Before referring to them it may not be out of place to remember it was a new interpretation of the law that was ushered in by these decisions. In the second *Pittapur case*[3] itself it was observed:

> "It is beyond doubt that the decisions in the Madras Courts prior to the case of *Sartaj Kuari* v. *Deoraj Kuari*[1], embodied the theory that there was joint property in an impartible zamindari, which only fell short of coparcenary because, by custom, partition was inadmissible."

It is needless to cite or examine the authorities as their Lordships do not apprehend that there is any doubt as to this statement being correct. It will be sufficient to quote a fragment of the decision of the Court of Appeal in that case itself:

> "It must be conceded that the complete rights of ordinary coparcenaryship in the other members of the family to the extent of joint enjoyment and the capacity to demand partition are merged in—or perhaps, to use a more correct term, subordinated to—the title of the individual member to the incumbency of the estate, but the contingency of survivorship remains along with the right to maintenance in a sufficiently substantial form to preserve for them a kind of dormant co-ownership."

This change is also noticed in *Abdul Aziz Khan Sahib* v. *Appayasami Naicker*[4], where again their Lordships observed that

> "It was the accepted law in Madras that the holder of an impartible zamindari, who was himself a member of an undivided family, could not alienate or incumber the corpus of the estate so as to bind his coparceners, except for justifiable especial causes. Prior to 1889 there had been a series of decisions to this effect in Madras Courts, but in that year, following the judgment of this Committee in the case of *Rani Sartaj Kuari* v. *Rani Deoraj Kuari*[1], the High Court of Madras overruled those decisions (*Beresford* v. *Ramasubba*[5]); and it has recently been held by this Committee in the case of *Raja Rao Venkata* v. *Court of Wards*[2], that impartible zamindaris in the Presidency of Madras are not inalienable in the absence of proof of some special family custom or tenure attaching to the zamindari, and having that effect."

In short the change over was from one legal theory to another. According to the earlier, there is nothing

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1. (1888) L.R. 15 I.A. 51: I.L.R. 10 All. 272 (P.C.).
2. (1899) 9 M.L.J. Supp. 1: L.R. 26 I.A. 83: I.L.R. 22 Mad. 383 (P.C.).
3. (1918) 35 M.L.J. 392: L.R. 45 I.A. 148: I.L.R. 41 Mad 778 (P.C.).
4. (1903) L.R. 31 I.A. 1 at 9: I.L.R. 27 Mad. 131 (P.C.).
5. (1889) I.L.R. 13 Mad. 197.

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incongruous in a joint family holding an impartible estate though its essential character of impartibility necessarily displaced the right to common enjoyment and partition. But succession and maintenance in no way impinging on impartibility were not struck at by it. The joint ownership remained as a live though dormant force, active not only in the matter of succession and maintenance, but also in regard to the restraint on alienation. Such was the view which had been consistently taken before 1889. Looking at it purely from the standpoint of legal theory, it is difficult to find fault with it. *Naraganti Achammagaru* v. *Venkatachalapati Nayanivaru*[1]. Indeed Lord Dunedin seems tacitly at any rate to concede so much, in *Baijnath Prasad Singh's case*[2].

According to the other theory of which the *Sartaj Kuari's case*[3] and the second *Pittapur case*[4], are the exponents, there can be no real coparcenary or joint ownership in impartible property and in strict legal theory, two such conflicting incidents as impartibility and co-ownership cannot co-exist side by side in the same estate at the same time. The holder must be the full and sole proprietor as he is in fact unrestrained in his enjoyment of the estate and uncontrolled in his power of disposal over it. Such an extensive right can be understood only if the estate is regarded as his separate or self-acquired property. True, the successor is to be ascertained by calling into aid the rule of survivorship peculiar to joint property, but that is not because of an actual, living, unity of title; it is merely a fiction to be imagined for the nonce, a mere survival perhaps from an archaic system which has perished. *Rajah of Kalahasti* v. *Achigadu*[5].

On the former of these two theories the claim to maintenance could be sustained; the latter would negative it. A choice has therefore to be made between these opposite theories, a choice, which has been rendered easy by the decision of the Board in *Baijnath Prasad Singh's case*[2] and in the *Collector of Gorakhpur's case*[6]. In them, the Privy Council appear to have unmistakeably made the choice themselves. It would not there-

1. (1881) I.L.R. 4 Mad. 250 at 266.
2. (1921) 40 M.L.J 387: L.R. 48 I A. 19, at 212: I L R. 43 All. 228 (P.C.).
3 (1888) L R. 15 I A 51: I.L.R. 10 All. 272 (P.C.).
4. (1918) 35 M.L.J 392: L.R. 45 I.A 148: I.L.R. 41 Mad. 778 (P.C.).
5. (1907) 17 M.L.J. 367: I.L.R. 30 Mad. 454.
6. (1934) 67 M.L.J. 274: L.R. 61 I.A. 286: I.L.R. 56 All. 468 (P.C.).

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fore be right for us to refuse to follow the interpretation given in these later decisions, whatever our view might have been in the absence of these decisions.

As will be shown presently the authority of *Sartaj Kuari's case*[1], and the others which had accepted the school of thought reflected in it holds good only in so far as the power of absolute disposal recognised in them is concerned. It is an anomaly no doubt that there could be a co-ownership which is at the same time capable of being destroyed by a unilateral and capricious disposal of the property by the head of the family. But law can scarcely be logical, where it is moulded and modified to give effect to intruding custom. It is not the function of this Court for that reason to cavil at an established principle if it has the support of the Judicial Committee. Its illogic, if any, has to be mended only by resort to legislation. In fact that is what happened in Madras. Soon after the decision of the Privy Council in the first *Pittapur case*[2], when this Presidency awoke to the new interpretation of the law, the Local Legislature effected by Statute a restoration of the law to what it was all along understood to have been. The Madras Impartible Estates Act, Acts II of 1902 and II of 1904 both contain provisions enacted for the purpose of replacing on the holder for the time being, the restraint on alienation, which had been displaced as a result of *Sartaj Kuari's case*[1]. More recently by an amending Act (XII of 1934) express provision has been made recognising a right of maintenance in favour of descendants up to the third degree, while in regard to others, the law was left where it was.

Baijnath Prasad Singh's case[3] is a definite landmark in the evolution of the law relating to impartible estates. The question there raised related to the succession to an ancient impartible estate, the contest being between the senior lineal descendant of the common ancestor of the last holder on the one hand, and his uncles who were therefore collaterals one degree nearer but of a junior branch on the other. The family was undivided. Their Lordships upheld the superior claim of the former, observing

"that this zamindari being ancestral property of the joint family, though impartible, the successor falls to be designated according to the ordinary rule

1. (1888) L R 15 I.A. 51 : I L.R. 10 All 272 (P.C.).
2. (1899) 9 M.L.J. Supp 1 : L.R. 26 I.A. 83 : I.L.R. 22 Mad. 383 (P.C.).
3. (1921) 40 M.L.J. 387 : L.R. 48 I.A. 195 : I.L.R. 43 All. 228 (P.C.).

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of the Mitakshara Law, and that the respondent being the person who in a joint family would, being the eldest of the senior branch, be the head of the family, is designated in this impartible Raj to occupy the gadi."

The entire case-law was most carefully considered by Lord Dunedin who had himself as a member of the Board delivered the judgment in the second *Pittapur case*[1]. The argument that impartible estates must be held to be governed by the ordinary rule of law applicable to separate or self-acquired property, as the logical and inevitable conclusion to be reached from the *Sartaj Kuari's case*[2] and the second *Pittapur case*[1], was in terms rejected. Lord Dunedin observed:

"The question of how to select the head of the family in a joint family is part of the general law. That the custom of impartibility does not touch it is shown by the long list of authorities above cited, and there is in their Lordships' view no necessary logical deduction from the decisions in *Sartaj Kuari's case*[2] and *Rama Rao* v. *Rajah of Pittapur*[1], which forces them to an opposite conclusion."

The first of these cases was distinguished on the ground that what was decided in it was that in an impartible Raj there was no *such* co-ownership in the other members as to give them a title to prevent alienation by the holder; and that the right of the other members that was being considered was a *presently existing* right and not *the chance* which each member might have of a succession emerging in his favour in the future which it was said, was obviously outside the inquiry. As regards the second *Pittapur case*[1], it was observed that the claim for maintenance as put forward was made, not against the head of the family of which the claimant was a member, but against a stranger donee, against whom it could not prevail unless it was of the nature of a real right. Their Lordships added:

"Now it could only be of the nature of a real right, *no proceedings having taken place before the estate got into the hands of the donee*, if the maker of the claim had before that event been a person who was in some way an actual co-owner of the estate, and any observations which go to the question of maintenance apart from the question of real right may be treated as *obiter dicta*."

The italics are mine. The italicised words appear to suggest that there was or might have been an enforceable claim against the estate so long as it was in the hands of the previous

1. (1918) 35 M.L.J. 392: L.R. 45 I.A. 148: I.L.R. 41 Mad. 778 (P.C.).
2. (1888) L.R. 15 I.A. 51: I.L.R. 10 All. 272 (P.C.).

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holder but it failed as against the donee because the claim had not been converted into a charge before the gift was made. But this construction cannot, I admit, be said to be clear enough for being acted upon more especially on account of the views expressed in the two later decisions of the Board to which I shall refer presently. It is more pertinent for the present purpose to enquire what in fact were the observations in the second *Pittapur case*[1], which in their Lordships' opinion deserved to be treated as *obiter dicta,* according to *Baijnath Prashad Singh's case*[2]. As I understand it, the position taken up by Lord Dunedin was this. The estate had passed into the hands of a stranger who had taken it absolutely under the will of the previous holder. Being a stranger to the family he cannot be made liable for the maintenance, unless the estate itself had been, previous to the transfer, subject to a charge. There was no charge for a mere maintenance claim under Hindu Law. In other words it was not of the nature of a real right. True he was a coparcener; but his coparcenership or co-ownership had been overwhelmed by the custom of impartibility, to such an extent that it ceased to be a full or actual co-ownership. It was not in fact an actual co-ownership at any time, but it was less of it, after *Sartaj Kuari's case*[3], which had negatived his right even to interdict an unjustifiable alienation in spite of its resulting in a total destruction of all his right. A discussion of such a limited co-ownership had no bearing on the claim as against the stranger, as it could not influence the decision in any event one way or the other. So it followed that the observations in the second *Pittapur case*[1] regarding the absence of coparcenary rights in an impartible estate were really unnecessary, and were accordingly to be treated as *obiter dicta.* Having thus disposed of the theory of a total absence of all coparcenary right in the junior members, his Lordship felt himself at liberty to examine the question afresh, and came to the conclusion that a limited coparcenary did exist in an impartible joint family estate and governed the choice of a successor to it. In so far therefore as the second *Pittapur case*[1] spelt the negation of a coparcenary in such an estate as being incompatible with

1. (1918) 35 M.L.J. 392: L.R. 45 I.A 148: I.L.R. 41 Mad. 778 (P.C).
2. (1921) 40 M.L.J. 387: L R 48 I.A. 195: I.L R. 43 All. 228 (P.C.).
3. (1888) L.R. 15 I.A. 51: I.L.R. 10 All. 272 (P.C.).

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impartibility it has ceased to be a binding authority. That is why, it seems to me, Lord Dunedin criticised the use of the words coparcenary and coparceners as applied to a joint family under the Mitakshara, and said that it is necessary not to fasten the attention on the word 'coparcenary' but rather to inquire what actually was decided in the *Sartaj Kuari's case*[1]. That again is the reason why turning to the second *Pittapur case*[2], they stated that it must be remembered that the claim put forward was made not against the head of the family of which the claimant was a member, but against a stranger. It is no longer possible to regard the second *Pittapur case*[2] as governing a claim to maintenance, where the claimant is a coparcener and a member of the joint family and not a mere stranger. Deprived as it undoubtedly was, of some of its essential attributes, coparcenary still remained, submerged but not destroyed, yet sufficiently alive to regulate succession. Whether it has been left with sufficient strength to support a claim to maintenance also, is a question which cannot be deemed to have been concluded by this case, but remains open for future decision. The power of independent disposal recognised by *Sartaj Kuari's case*[1] was however affirmed, with the observation that case had stood too long to be disturbed.

The nature of the coparcenary right in relation to an impartible estate once again arose for consideration by the Privy Council in *Protap Chandra Deo's case*[3]. The main appeal before the Board was directly concerned with the validity of a disposition by will by which the last holder had diverted the succession away from the appellant who would have in the ordinary course taken it by survivorship, as the family was undivided and the estate, ancestral. The will was upheld. No other conclusion could have been arrived at without overruling the *Sartaj Kuari's case*[1] and the cases that followed it which their Lordships declined to do. The inconsistency between the two lines of cases the one accepting, and the other negativing the co-ownership theory, was again urged, but in vain, as *Baijnath Prashad Singh's case*[4] was considered fatal to the contention. But of special significance to the present appeal are, it is urged,

1. (1888) L.R. 15 I.A. 51: I.L.R. 10 All. 272 (P.C.).
2. (1918) 35 M.L.J. 392: L.R 45 I.A. 148: I.L.R. 41 Mad. 778 (P.C.).
3. (1927) 53 M.L.J. 30: L.R. 54 I.A. 289: I.L R. 54 Cal. 955 (P.C.).
4. (1921) 40 M.L.J. 387: L.R. 48 I.A. 195: I.L.R. 43 All. 228 (P.C.).

the observations of the Board made in the cross appeal of the respondent objecting to the High Court's order regarding the appellant's claim to maintenance. Their Lordships negatived it.

"Firstly, on the ground that the maintenance of himself or his family was already provided by a Khorposh grant of certain villages to his predecessors, which villages are still in his possession; and secondly because he has failed to establish a right to maintenance by custom or relationship or in any other way. *See* the second *Pittapur case*[1]."

The express approval of the decision of the second *Pittapur case*[1] coupled with the non-recognition of relationship as a ground of claim in itself, does seem to go far to support the appellant's contention. But as against this it was argued before us that in view of the finding that the claim had been satisfied by a suitable provision already made, the reference to custom and relationship as the basis of the claim should not be regarded as a binding decision.

In *Shiba Prasad Singh* v. *Prayag Kumari Debi*[2], the question whether co-ownership can be said to be an attribute of a joint but an impartible estate, was once again raised and considered. Their Lordships re-affirmed the principle of *Baijnath Prasad Singh's case*[3], which did not in fact enunciate a new principle, as again and again pointed out by the Board. The applicability of the Mitakshara joint family law, was once again reiterated, their Lordships observing that the right of survivorship is not to be regarded as a mere *spes successionis*, but a right capable of being renounced and surrendered. Any lingering doubt based on the observation of their Lordships in *Baijnath Prasad Singh's case*[3], where they spoke of co-ownership as not amounting to a *presently existing right*, and as giving rise to a mere *chance* of succession, was dispelled. This of course sounds the death knell of the view that joint ownership in regard to an impartible estate is a mere myth. But here again observations do occur, regarding maintenance on which the appellant naturally enough founds himself. Referring to the four incidents which usually come up for consideration when an impartible estate is claimed as being held by a joint family, their Lordships analysed the legal position and held that out of those incidents, namely, (1) the right to partition; (2) the right to restrain alienation by the head of the family except for necessity; (3) the right of mainten-

1. (1918) 35 M L.J. 392: L.R. 45 I A. 148: I L R. 41 Mad 778 (P.C).
2. (1932) 63 M L J. 196: L.R. 59 I.A. 331: I L.R. 59 Cal. 1399 (P.C.).
3. (1921) 40 M.L.J. 387: L.R. 48 I.A. 195: I L.R. 43 All. 228 (P.C.).

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ance; and (4) the right of survivorship, the first three should be held to have been superseded by custom; and that consequently an impartible estate though ancestral must be deemed to have become clothed by custom with the incidents of self-acquired and separate property. The meaning of their Lordships' observations is plain, namely, that the right of maintenance must be regarded as incompatible with impartibility and cannot therefore be substantiated except by proof of a custom. But it is no disrespect to their Lordships to say that what was said about maintenance in this case was by way of a reconciliatory statement of differing views as they were, rather than a definite decision that one was right and the other wrong.

The Collector of Gorakhpur v. *Ram Sundar Mal*[1], contains the latest exposition of the law by the Judicial Committee in a way which, in my opinion, leaves no more doubt as to the principle on which this appeal falls to be decided. Without it, I may frankly admit, the decision of this case must be the other way. It may be that the question of maintenance was not the question that called for a direct decision in this case either, which in fact related to a question of succession. But that is not a criticism to which this Court, at any rate, can attach weight. It was Lord Blanesburgh who delivered the judgment but the Board included Sir John Wallis whose intimate familiarity, if I may say so with respect with the peculiarities of the law relating to impartible estates is so well known, that an added importance attaches to the general position of the law categorically stated in the shape of seven propositions of which Nos. 1, 2, 3 and 7 are of the utmost importance for the present purpose. Of these propositions, Nos. 1 and 2 do not call for special notice as they are general in character and refer only to the error of thinking that a custom of impartibility is destructive of the co-ownership of the junior members of the joint family. But Nos. 3 and 7 are couched in unambiguous language and mark, as I think, a definite restoration of the law such as it was understood to be before *Sartaj Kuari's case*[2]. That law, as I understand it, recognised the right of a junior member however remote, to maintenance out of the joint family estate, as a consequence of his membership alone, without proof of a

1 (1934) 67 M.L.J. 274: L.R. 61 I.A. 286: I.L.R. 56 All. 468 (P.C.).
2. (1888) L.R. 15 I.A. 51: I.L.R. 10 All. 272 (P.C.).

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custom. The words "*at length*" and "*now*" used in the third proposition and the observation in the seventh that the recent decisions of the Board constitute a further land mark in the judicial exposition of the question at issue show that while they were quite conscious of the contrary theories which had found expression in the second *Pittapur case*[1] and the two other cases cited above, *Protap Chandra Deo's case*[2] and *Shiba Prasad Singh* v. *Prayag Kumari Debi*[3], their Lordships definitely declined to perpetuate them. The true basis of the right of maintenance, namely, the joint ownership of the junior members according to the Mitakshara law was at last accepted and the *Chellapalli case*[4], which had been decided without reference to custom was cited as illustrative of that view though it had been understood in a different sense in the second *Pittapur case*[1]. The seventh proposition quite clearly re-affirmed the dethronement of the theory of fictional co-ownership, in far more positive language than even that used in *Protap Chandra Deo's case*[2] and proceeded to derive the right to maintenance from membership of the family as the result from a cause where the family was joint.

I regard this case as finally setting at rest all controversy on the subject of impartible estates. The status of the junior members has at long last been vindicated and with it also the attendant right to maintenance arising out of it, though it might be defeasible by an alienation supervening, unless made a charge on the estate in the meanwhile. For it is clear that freedom from restraint on alienation whether illogical and incongruous or not remains supreme, at any rate in those provinces where legislation has not been resorted to. The learned Judge in the Court below is of the opinion that the second *Pittapur case*[1], still governs the question of maintenance, as on this point, it had not been departed from in the two later cases referred to above *Protap Chandra Deo's case*[2] and *Shiba Prasad Singh's case*[3] and must be held not to have been departed from even in the last one either. He thinks that in the use of the qualifying phrase 'however limited' in the third proposition of their Lordships in the *Collector of Gorakhpur's case*[5], there is a sufficient expression of intention to leave the

1. (1918) 35 M.L J. 392: L R. 45 I.A. 148: I.L.R. 41 Mad. 778 (P.C.).
2. (1927) 53 M.L.J. 30: L.R. 54 I.A. 289: I.L.R. 54 Cal. 955 (P C.).
3. (1932) 63 M.L.J. 196: L.R. 59 I.A. 331: I.L R. 59 Cal. 1399 (P.C).
4. (1900) 10 M.L.J. 294: L.R. 27 I.A. 151: I.L.R. 24 Mad. 147 (P C.).
5. (1934) 67 M.L.J. 274: L.R. 61 I.A. 286: I.L.R. 56 All. 468 (P.C.)

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right of maintenance to be still regulated by the second *Pittapur case*[1]. In the first place such a construction seems to be opposed to the general tenor of exposition adopted in the judgment, and attaches no significance to the use of the words 'at length' and 'now' by their Lordships; secondly and in view of their Lordships' obvious disinclination to accept the soundness of the several principles enunciated in second *Pittapur case*[1] and the earlier cases which it purported to follow, a restatement of the law became necessary, for the purpose of redeeming it from the confusion which had resulted from those cases. This, their Lordships did in the clearest way possible, so as to avoid misunderstanding in the future. Thirdly, there is no warrant for reading into the words 'however limited' a meaning out of tune with the theme of the judgment. It is quite possible to give full effect to those words by regarding them as a reference to the defeasibility of the right by alienation which is a limitation imposed by *Sartaj Kuari's case*[2]. Or what is more probable their Lordships might have used the words by way of a necessary caution in view of the possibility of some limitation existing in the law itself, without deciding, as their Lordships were not called on to decide, whether it in fact existed or not.

The learned Subordinate Judge also refers to Ramesam, J.'s judgment in *Commissioner of Income-tax* v. *Zamindar of Chemudu*[3] as also lending support to his view. In that case the question was whether the money received by the uncle of the holder of an impartible estate was taxable as money received by him as a member of a Hindu undivided family within S. 14 (1) of the Income-tax Act, 1922. The answer was in the affirmative. The decision did not, as it could not, take note of the *Collector of Gorakhpur's case*[4], which came later. The right of junior members other than the son of the last owner did not arise for consideration either, and was not in fact considered. If I may say so with respect, the sentence extracted from his judgment by the learned Subordinate Judge seems to my mind to lay down the contrary of what he has said about it. I am

1. (1918) 35 M.L.J. 392: L.R. 45 I.A. 148: I.L.R. 41 Mad. 778 (P.C.).
2. (1888) L.R. 15 I.A. 51: I L.R. 10 All. 272 (P.C.).
3. (1934) 67 M.L.J. 306: I.L.R. 57 Mad. 1023 (F.B.).
4. (1934) 67 M.L.J. 274: L.R. 61 I.A. 286: I.L.R. 56 All. 468 (P.C.).

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free to confess that for myself I regard the reference in the second *Pittapur case*[1] to the *Chellapalli case*[2] as one made for the purpose of explaining that the latter case should be regarded as truly based on custom and not on law, only that the custom was one which did not require proof on account of its having been frequently acted upon by Courts. Ramesam, J., however thinks that Lord Dunedin intended to say that the right to maintenance was not the creature of custom, but an incident of the law which had not yet in that respect been encroached upon by custom. *Subbayya Thevar* v. *Sivagnana Marudappa Pandian*[3] on this view. This, of course, is the view which has been since expounded in the *Collector of Gorakhpur's case*[4], though I doubt whether Lord Dunedin meant to convey that sense in the following passage:—

> "As to the zamindari estate, the Board held it was impartible, and the consequence is that the plaintiffs as the younger brothers of the zamindar retain such right and interest in respect of maintenance as belong to the junior members of a Raj or other impartible estate descendible to a single heir."

It may be observed in passing that if the right to maintenance is based on the law, no proof except of course of the necessary relationship, need be given. It is only where the law does not confer the right (*Rajah Rup Singh* v. *Rani Baisni*[5]), a special custom recognising the right has to be established by the production of the kind of proof (*Ramalakshmi Ammal* v. *Sivanatha Perumal Sethurayar*[6]) required to establish a custom at variance with the law. In the second *Pittapur case*[1], which proceeded on a theory which must now be deemed to have been at last exploded, the claim failed as there was no proof of the custom. Now that the law has been ascertained or to be more correct, re-ascertained, as favouring the recognition of the right of a member, the only question for consideration is whether the respondents are members of the family, and that question has to be answered, as already mentioned, in the affirmative.

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1. (1918) 35 M.L.J. 392: L.R. 45 I.A. 148: I.L.R. 41 Mad. 778 (P.C.).
2. (1900) 10 M.L.J. 294: L.R. 27 I.A. 151: I L.R. 24 Mad. 147 (P.C.).
3. (1936) 71 M.L.J. 568, 572.
4. (1934) 67 M.L.J. 274: L.R. 61 I.A. 286: I.L.R. 56 All. 468 (P.C.).
5. (1884) L.R. 11 I.A. 149: I L.R. 7 All. 1 (P.C).
6. (1872) 14 M.I.A. 570 at 585.

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There are no degrees of relationship to be taken note of for the purpose of maintenance, for in a joint family living in union, every member however remote has the right to be maintained out of the common property as is even now the case in the Malabar tarwads not subjected to a division under Madras Act XXII of 1933. The right to maintenance is indeed the mode in which the right of ownership in the tarwad property is most effectively enforced by the junior members. The incidents of the joint holding of tarwad property approximate closely to those that attached to an impartible estate according to the decisions prior to the *Sartaj Kuari's case*[1]. The karnavan of a Malabar tarwad occupies a position similar in several respects to that of the holder of an impartible estate. There is so much that is common to the Mitakshara Joint Family Law and the Marumakkathaya Law that the latter may be regarded without much violence either to principle or legal history, as representing but a school of Hindu Law as Sundara Aiyar, J., thought, in spite of its being based on the matriarchal instead of the patriarchal theory of joint family. It is as difficult on principle to limit the right of maintenance to a few only of the members as it is to limit the membership itself in the one case as in the other, for, after all maintenance is the necessary resultant of membership. The position would be different if the family is governed by the Dayabagha or even by the Mitakshara Law if the estate is the separate or the self-acquired property of the holder.

The Privy Council having in their latest pronouncement resuscitated in express terms the principle of the decision in the *Chellapalli case*[2], it is desirable to see precisely what the nature and character of that principle is. The relevant observations have been extracted above, and are not now to be understood as they were sought to be interpreted in the second *Pittapur case*[3]. On the contrary, they have now to be taken as a statement of the law according to which junior members have a right to maintenance by law and there is no need any longer to prove a custom to make it out. Emphasis is not to be placed on the claim being a claim by younger brothers, which of course was

1. (1888) L.R. 15 I.A. 51 : I.L.R. 10 All. 272 (P.C.).
2. (1900) 10 M L J. 294 : L.R. 27 I.A. 151 at 157 : I.L.R. 24 Mad. 147 (P.C.).
3. (1918) 35 M.L.J. 392 : L.R. 45 I.A. 148 : I.L.R. 41 Mad. 778 (P.C.).

the fact in the particular case, but on the right under law admitted to inhere in the junior members.

Some of the earlier cases may now be noticed as they show that Lord Blanesburgh's exposition is in accord with the law regarding maintenance as understood before *Sartaj Kuari's case*[1]. The *Hunsapur case*[2] was decided on the finding that the estate was the separate and self-acquired property of the last holder. The successful heir was a grandson by the eldest son in whose favour the last holder had also executed a will. The decision apparently proceeded on the footing that the Mitakshara Law was applicable. The observations at the end of p. 39 of the report to the effect that there are no inchoate rights of inheritance in the junior members of the family and that they did not by birth acquire community of interest with their grandfather must be understood with reference to the finding that the estate was the separate estate of the grandfather who was the last holder. At the same time there is in the judgment a reference to the right of maintenance of junior members, though the estate descended and was held according to the rule of primogeniture. This reference is perhaps capable of being explained away on the ground that it may be regarded as an incident established by custom in that case, though there is in fact no reference in the judgment to any such specific custom. *Stree Rajah Yanumula Venkayammah* v. *Stree Rajah Yanumula Boochia Venkondora*[3], a decision of the Privy Council, applied the rule in the *Sivaganga case*[4], with this difference that whereas in the *Sivaganga case*[4] the estate was found to be the separate property of the last holder, the finding in this case was that it was the joint estate of the respondent and the appellant's husband. The appellant failed because the respondent took the estate by survivorship. In this case, there was a grant to the common ancestor of the family, which referred to the provision of *vasaties* (landed gifts) to the three brothers who were the junior members of the family, by way of maintenance. Referring to this provision, their Lordships made the significant observation:

"These grants by way of maintenance are in the ordinary course of what is done by a person in the enjoyment of a raj or impartible estate in favour of the junior members of the family; who, but for the impartibility would be coparceners with him."

1. (1888) L.R. 15 I.A. 51 : I.L.R. 10 All. 272 (P.C.).
2. (1867) 12 M.I.A. 1.
3. (1870) 13 M.I.A. 333.
4. (1863) 9 M.I.A. 539.

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In *Periasami* v. *Periasami*[1], referring to the succession of the eldest of three brothers to an impartible estate, the Board observed that the estate must be taken to have descended to him as ancestral estate and that

"he would therefore necessarily be joint in that estate, so far as is consistent with its impartible character, with his two younger brothers, the latter taking such rights and interests in respect of maintenance and possible rights of succession as belong to the junior members of a joint Hindu family in the case of a raj or other impartible estate descendible to a single heir."

The observations in the three cases referred to above seem definitely to acknowledge a right of maintenance as inherent in the junior members of a joint family holding an impartible estate as family property. The matter is further dealt with in *Naraganti Achammagaru* v. *Venkatachalapathi Nayanivaru*[2], where the statement of the law occurs at p. 266:

"But where, from the nature of the property, possession is left with one coparcener, the others are not divested of co-ownership. Their necessary exclusion from possession imposes on the co-owner in possession two obligations to his coparceners in virtue of their co-ownership—the obligation to provide them with maintenance and the obligation to preserve the corpus of the estate. The rights of possession and maintenance are to this extent distinct and inconsistent that they cannot co-exist and be enjoyed by the same persons, that the one is a right to the immediate perception of the fruits of the property, the other a right to an indirect benefit, but both rights have a common origin, unity of ownership."

As I have said, there is nothing inherently incongruous in the theory thus expounded. But so far alone as the obligation to preserve the corpus of the estate for the benefit of the junior members is concerned, it must now be taken that it has been finally negatived by the *Sartaj Kuari's case*, the first *Pittapur case* and *Protap Chandra Deo's case* already referred to. In the *Udayarpalayam case*[3], confirmed by the Privy Council in the *Udayarpalayam case*[4] and in *Venkatachala Reddiar* v. *Venkatachala Reddiar*[5], the nephew of the last zamindar that is a member beyond the first degree, was held entitled to maintenance out of the estate as a junior member. In the second of these cases, the decision of the Privy Council in the *Chellapalli case*[6] was referred to as recognising the legal right to maintenance of the junior members of a raj or other impartible estate, the learned

1. (1878) L.R. 5 I.A. 61: I.L.R. 1 Mad. 312 (P.C.).
2. (1881) I.L.R. 4 Mad. 250.
3. (1901) 11 M.L.J. 191: I.L.R. 24 Mad. 562.
4. (1905) 15 M.L.J. 312: L.R. 32 I.A. 261: I.L.R. 28 Mad. 508 (P.C.).
5. (1909) 20 M.L.J. 394.
6. (1900) 10 M.L.J. 294: L.R. 27 I.A. 151: I.L.R. 24 Mad. 147 (P.C.).

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Judges one of whom Mr. Justice Wallis, as he then was, observing that so far as their knowledge extended, the claim was in accordance with the usage prevailing in Southern India. In the next decision of the Madras High Court in *Tirumal Rao* v. *Rangadani*[1], a claim for maintenance was successfully advanced by a person, who was more than three degrees removed from the common ancestor but who was still a member of the joint family along with the holder. A great portion of the elaborate judgment delivered in this case was taken up with a discussion of the effect of *Sartaj Kuari's case*[2] and a conclusion was reached almost parallel to that reached later by the Privy Council. The remoteness of the plaintiff's relationship which was without success made the ground of attack was not however the remoteness beyond the first degree mentioned in the second *Pittapur case*[3], but a remoteness of more than three degrees which it was contended dissipated the coparcenary right even in an ordinary Hindu joint family. The contention was negatived but what is of interest for the present purpose is that even so remote a collateral as a claimant beyond the third degree was recognised as entitled to maintenance. This decision was followed in a later case in *Rangappa Kalakka* v. *Kulandai Ayal*[4], where the proposition that the junior members of a joint family holding an impartible estate are entitled to maintenance out of the impartible property was accepted and extended to the case of the widow of such a member.

As I understand these cases, it appears to me that there is no warrant for holding that a junior member, though he may be neither a brother nor a son is to be regarded as disentitled to maintenance out of the impartible estate when it is held by a family of which he is a member. If the estate does not belong to a joint family but is the separate or self-acquired property of the holder, the rule is of course different. (*Subbayya Thevar* v. *Sivagnana Marudappa Pandiyan*[5].) In such a case, any junior member irrespective of the degree of relationship must, if he can, make out his right only by proof of a custom. It may be that if he is a brother or a son, a custom in his favour will be

1. (1912) 23 M.L.J. 79.
2. (1888) L.R. 15 I.A. 51 : I.L.R. 10 All. 272 (P.C.).
3. (1918) 35 M.L.J. 392 : L.R. 45 I.A. 148 : I.L.R. 41 Mad 778 (P.C.).
4. (1914) 26 M.L.J. 205.
5. (1936) 71 M.L.J. 568.

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presumed on account of the rule mentioned at the bottom of page 154 in the second *Pittapur case*[1], namely:

"When a custom or usage, whether in regard to a tenure or a contract or a family right, is repeatedly brought to the notice of the Courts of a country, the Courts may hold that custom or usage to be introduced into the law without the necessity of proof in each individual case."

Indeed, where the law itself favours the claim there is no necessity for relying upon a custom, which, if it did exist would coincide with it.

In conclusion I may also mention that it is a matter of some satisfaction that our decision on the question of Hindu Law is in accordance with what the members of this family seem themselves to have thought right. In the deed of settlement, there is not the slightest indication that junior members beyond the first degree were regarded as not entitled to maintenance out of the estate. The deed was as is quite apparent, primarily brought about for settling a claim to partition put forward by two of the four brothers and not for the purpose of resolving a disputed question of maintenance. It recited the Rulers for the time being shall:

"*according to law and custom* completely possess all the privileges and enjoy them, subject only to the condition of paying allowance to the other members of our family suitably to their respective status, out of the income from the estate and the properties."

And again in cl. 5, it is stated:

"As the said Venkatagiri estate is impartible and as the aforesaid Sri Muttukrishna Yachendrulu Varu, Sri Venkatakrishna Yachendrulu Varu and Sri Venugopala Krishna Yachendrulu Varu and *their male descendants are entitled to get allowances from the said estate*, we appointed the Rajah of Bobbili, as mediator, to determine the amount of allowance to be given to the said Sri Muttukrishna Yachendrulu Sri Venkata Krishna Yachendrulu and Sri Venugopala Krishna Yachendrulu and to their male descendants."

These two extracts from the deed, show that the parties to it and their advisers, namely, Sri Kumara Yachama and the Maharaja of Bobbili understood the law and custom to be that other members of the family in general and not merely the sons and brothers of the holder were entitled to be maintained. A further significance arises out of the fact that the deed was also the result of a consultation with the father Sri Kumara Yachama which preceded the settlement, who, as the document states it, *knew everything and who had considerable experience.*

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1. (1918) 35 M.L.J. 392: L.R. 45 I.A. 148: I.L.R. 41 Mad. 778 (P.C.).

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Another circumstance on which some point was made for the respondents was that the deed is dated 8th April, 1889. It was said that the effect of *Sartaj Kuari's case*[1], though anterior in date was not realised in Madras till October of the following year when alone; it became known by reason of the decision in *Beresford* v. *Ramasubba*[2]. So it was contended that it must be held that the parties acted on the view of the law as it was understood prior to the *Sartaj Kuari's case*[1], and effect should accordingly be given to it. There is authority for this proposition, it was urged in *Abdul Asis* v. *Appayasami*[3]. Whether there is any substance in this argument or not, I do not think it necessary on the view I have taken, to discuss this aspect of the matter, as independently of it the claim of the respondents seems sufficiently well-founded.

The result of the case-law on the question of maintenance of junior member may now be summed up thus. Till the decision of the *Sartaj Kuari's case*[1], his right to maintenance by reason of his membership of the family, was open to no doubt in spite of the family property being impartible. That case recognised in the holder for the first time a power of unrestrained disposal over the estate in derogation of the rights of the other members of the family which were held not to exist, as there could be no right by birth where there is no right to partition. The latter cases have not interfered with the power of absolute disposal recognised by this case, but on the contrary have affirmed it. In so far as the question of succession is concerned, the Privy Council have clearly and unambiguously re-asserted the existence of a real and not merely a visionary coparcenary in the members of the family. In regard to maintenance which is an ordinary incident of partible property, there are no decisions which can now be treated as ruling the point. There have been two cases in which the question of maintenance arose for decision, namely, the second *Pittapur case*[4] and *Protap Chandra Deo's case*[5]. The first of these cases though a direct decision must now be regarded as having proceeded on the entire absence of relationship between the parties and is not therefore to be regarded as authority in a case where

1. (1888) L.R. 15 I.A. 51: I.L.R 10 All. 272 (P.C.).
2. (1889) I.L.R. 13 Mad. 197.
3. (1903) L.R. 31 I.A. 1: I L.R. 27 Mad. 131 (P.C.).
4. (1918) 35 M.L.J. 392: L R. 45 I.A. 148: I.L.R. 41 Mad. 778 (P.C.)
5. (1927) 53 M.L.J. 30: L.R. 54 I.A. 289: I.L.R. 54 Cal. 955 (P.C.).

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a relationship and membership is set up and found, the present being such a case. The observations in the second of the cases though clear in themselves and may and ought to be treated as binding, have been counteracted and neutralized by the latest pronouncement of their Lordships in the *Collector of Gorakhpur's case*[1], which has cleared the way for the application of the rule in force before the advent of the doctrine propounded by the *Sartaj Kuari's case*[2] and the other cases including the *Jaipur case*[3], which followed it, and which spelt the absence of co-ownership in the junior members of a family holding an impartible estate. We are therefore bound to give effect to the principle of the latest decision of the Privy Council, and so doing, we must uphold the respondents' claim.

For the reasons explained above, I am of opinion that the respondents are under the Hindu Law, entitled to maintenance from the impartible estate in the hands of the appellant. On the other points that arise in the case, I have nothing to add to the judgment of my Lord the Chief Justice.

This appeal having been set down for being "spoken to" this day, the Court made the following

ORDER.—By consent the monthly allowance will be payable on the 15th of the succeeding month.

Appeal allowed on the question of the deed and memorandum of objections allowed on the question of Hindu Law.

K. S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE LAKSHMANA RAO.

Nataraja Goundan .. *Appellant* (2nd Accused).*

Nataraja Goundan, *In re.*

Indian Penal Code. (XLV of 1860), S. 326—Grievous hurt—Weapon not proved to be deadly—Hurt, mere simple fracture of the radius of arm—If falls under S. 326 or S. 323, I. P. Code.

A person cannot be convicted under S. 326, Indian Penal Code, unless the weapon used by him was deadly and the hurt intended or known to be likely to be caused was grievous. In the absence of the stick used by him or any evidence of its size or nature and where the injury itself was only a simple fracture of the radius of the right arm the conviction under S. 326, Indian Penal Code, is not proper.

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1. (1934) 67 M.L.J. 274: L.R. 61 I.A. 286: I L.R. 56 All. 468 (P.C.).
2. (1888) L R. 15 I.A. 51: I.L.R. 10 All. 272 (P.C.).
3. (1919) 37 M.L.J. 188: 24 C.W.N. 226 (P.C.).

* Crl. App. No. 22 of 1938. 8th August, 1938.

Appeal against the order of the Additional Sessions Judge of Court of Session of the Coimbatore Division in Case No. 154 of the Calendar for 1937 dated 27th December, 1937.

V. T. Rangaswami Aiyangar and *K. Ramaswami Aiyangar* for Appellant.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court delivered the following

JUDGMENT.—The appellant has been convicted under S. 326 of the Indian Penal Code of voluntarily causing grievous hurt with a deadly weapon to P.W. 2 Kuppa Chuckli and sentenced to rigorous imprisonment for four years by the learned Additional Sessions Judge of Coimbatore.

It is undoubted and was not disputed that P.W. 2 was assaulted with sticks in and near the garden of the appellant after lamp-lighting time on the 20th of September, 1937 and there is no good reason to doubt the statement of P.W. 2 that the appellant was one of his assailants. That P.W. 2 was found carrying away some ragi stalks from the garden of the appellant is no justification for the assault and one of the injuries, namely, the simple fracture of the radius of the right arm was grievous. But this might have been due to the beating by the other assailants and even otherwise the appellant cannot be convicted under S. 326 of the Indian Penal Code unless the weapon used by him was deadly and the hurt intended or known to be likely to be caused was grievous. The stick used by him is not before the Court nor is there any evidence as to its size or nature. The injury constituting grievous hurt was a simple fracture of the radius and it cannot be said for certain that hurt intended or known to be likely to be caused was grievous. The conviction under S. 326 of the Indian Penal Code is therefore unsustainable and the appellant can be convicted only under S. 323 of the Indian Penal Code.

The conviction of the appellant is therefore altered to one under S. 323 of the Indian Penal Code and he is sentenced to rigorous imprisonment for 3 months. Otherwise the appeal is dismissed.

S.V.V. *Sentence reduced otherwise appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE NEWSAM.

Gaja Gopi Reddi, minor by guardian and mother Seshamma .. *Petitioner** (*Petitioner*)

v.

Pulla Rami Reddi .. *Respondent* (*1st Respondent*).

Gopi Reddi *v.* Rami Reddi.

Madras Agriculturists Relief Act (IV of 1938), Ss. 19 and 20—Application by one member of a joint Hindu family under S. 20—Failure by him to file application under S. 19 in time—If other members could apply again.

Where one member of a joint Hindu family filed an application under S. 20 of Madras Act IV of 1938 and obtained stay of execution but failed to file an application in time under S. 19, the other members are bound by any order passed on the applicant member's application or any default committed by him and each member cannot individually claim to apply under the section.

Petition under S. 115 of Act V of 1908, praying the High Court to revise the order of the Court of the District Munsif of Kurnool dated 14th August, 1938 and made in E. A. No. 685 of 1938 in E. P. No. 611 of 1937 in O. S. No. 46 of 1937.

K. Srinivasa Rao for Petitioner.

P. Chandra Reddi for Respondent.

The Court delivered the following

JUDGMENT.—The facts are these. The judgment-debtor was a joint family. The father and manager of the joint family filed a petition under S. 20 of the Act and obtained stay of execution, but failed to file an application under S. 19 (for scaling down the debt) within 60 days. Later on his minor son, represented by his mother, filed applications under Ss. 19 and 20 of the Act, which have been dismissed.

The question arises whether every member of a joint family can file a petition under Ss. 19 and 20 or *any* member. The word used in S. 19 is *any member* and that must obviously be so, for it is a concession to joint families that any member entitled to relief may apply for stay and scaling down. The concession is not that every member of the family in succession may obtain 60 days' stay. Obviously the joint family is bound

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* C. R. P. No. 1074 of 1938 . 17th March, 1939.

by any order passed on the application of any member, or by any default committed by any member.

I dismiss this petition with costs.

S. V. V. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE SOMAYYA.

Rm. Ar. Ar. Rm. Arunachalam Chettiar (dead) and others .. *Appellants* (1st Respondent and his Legal Representatives and supplemental Appellants)*

v.

Sabaratnam Chettiar and others .. *Respondents (Respondents 3, 2 and 1).*

Provincial Insolvency Act (V of 1920), S. 28 (2)—Joint Hindu family—Insolvency of father—Attachment of son's shares before the sale thereof by Official Receiver—Effect on power of Official Receiver—Leave of Insolvency Court—If necessary for attachment of son's share.

The father of a joint Hindu family was adjudicated an insolvent. Before the Official Receiver completed the sale of the shares of the sons for the benefit of the creditors, those shares had been attached in execution of a decree obtained by their creditor.

Held, that S. 28 (2) of the Provincial Insolvency Act refers only to the property of the insolvent. Proceedings can be taken in respect of the sons' interest in the family property without the leave of the Insolvency Court but as a result of the attachment in this case the Official Receiver has lost the power to sell the property of the sons for the lawful debts of the insolvent father.

Gopalakrishnayya v. *Gopalam*, (1928) 54 M.L.J 674: I.L.R. 51 Mad. 342; *Chinna Veeriah* v. *Gurivi Reddi*, (1933) 66 M.L.J. 277 and C. M. A. No. 253 of 1936, relied on.

Baluswami Naidu v. *Official Receiver, Madura*, (1938) 1 M.L.J. 824, disapproved.

Appeal against the order of the District Court of Ramnad at Madura dated 2nd July, 1936, and passed in C.M.A. No. 105 of 1932 preferred against the order of the Court of the Subordinate Judge of Devakottah in I.A. No. 423 of 1932 in I. P. Nos. 12 and 13 of 1927.

M. Patanjali Sastri and *T. K. Sundararaman* for Appellants.

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* A.A.A. O. No. 166 of 1936. 9th February, 1939.

Arunachalam Chettiar v. Sabaratnam Chettiar.

M. Murugappa Chettiar, K. Sankara Sastri and *T. M. Ramaswami Aiyar* for Respondents.

The Court delivered the following

Leach, C.J.

JUDGMENTS. *The Chief Justice.*—On the 24th September, 1931, the appellant obtained a decree for Rs. 19,383-10-1 with interest against one Ramaswami Chettiar and his five sons. The father and the sons constituted a joint Hindu family. In 1926 the father was adjudicated an insolvent by the Subordinate Judge of Tinnevelly. The Court of the Subordinate Judge of Devakottah subsequently obtained seisin of the insolvency proceedings and the estate of the insolvent vested in the Official Receiver of Ramnad. The Official Receiver sought to bring the whole of the family properties to sale for the benefit of the creditors on the ground that the sons' shares in those properties were available for the discharge of the father's debts on the principle of Hindu law that sons are liable for their father's debts. The Official Receiver received bids for the various items of property in March 1932, but he did not accept any bid and adjourned the sale until the 9th April, 1932. Mean while the appellant had filed in the Court of the Subordinate Judge of Devakottah proceedings in execution of his decree and asked for the attachment of the shares of the sons in the family properties. An order was issued and the properties were attached. The appellant then filed an application asking the Court to restrain the Official Receiver from proceeding to sell the shares of the sons in the attached properties. By consent, on the 9th April, 1932, an order was passed by the Subordinate Judge allowing the Official Receiver to proceed with the sale of the properties, but subject to his paying five-sixths of the proceeds (the amount representing the sons' shares) into Court pending the decision of the main application. In pursuance of this order the Official Receiver sold the properties in June 1932 and realised a total sum of Rs. 17,400. Of this amount Rs. 14,500, representing the shares of the sons, was deposited in the Court of the Subordinate Judge. The Subordinate Judge having heard the parties held that the appellant was entitled to an order for payment to him of the Rs 14,500 on the ground that the Official Receiver's power to sell the interests of the sons in the properties for the discharge of the father's debts was defeated by the order of attachment. The Official Receiver appealed to the District Judge, who reversed the decision of the Subordinate

Judge on the ground that the right to sell the properties had vested in the Official Receiver either at the time of adjudication or some time before the sale of the properties took place. The learned District Judge failed to understand the question which was before him. The fact that the right to sell the sons' shares had devolved on the Official Receiver was not the only factor. The present appeal is from the order of the District Judge.

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Leach, C.J.

The appellant contends that the Official Receiver merely stands in the shoes of the father. He says that as the attachment would be valid against the father and would prevent him from exercising his power to sell his sons' interests in the family properties in order to discharge his own debts, the attachment puts an end to the right of the Official Receiver to sell as he has no greater rights than the father. The Official Receiver does not attempt to support the decision of the District Judge on the ground given by the District Judge, but he says that there cannot be a valid attachment without the leave of the Insolvency Court and in this connection relies on the provisions of S. 28 of the Provincial Insolvency Act, 1920. Before examining the effect of S. 28 it will be convenient to refer to certain authorities which lay down principles which have application here.

In *Sat Narain* v. *Behari Lal*[1], the Privy Council held that when a Hindu is adjudicated an insolvent under the Presidency Towns Insolvency Act, 1909, his sons' interests in the joint family property do not thereby become vested in the Official Assignee, although under S. 52 or in some other way their interests in the family property might be available for the payment of the father's debts. There is no provision in the Provincial Insolvency Act which renders the position any different to the position under the Presidency Towns Insolvency Act. In *Seetharama Chettiar* v. *Official Receiver, Tanjore*[2], a case governed by the Provincial Insolvency Act, a Full Bench of this Court expressly held that on the insolvency of a Hindu who is subject to the Mitakshara law the insolvent's power to sell his sons' shares in the family property for paying his just and proper debts vests in the Official Receiver but that the sons' shares do not vest in him. This principle was reaffirmed by

1. (1924) 47 M.L.J. 857: L.R. 52 I.A. 22: I.L.R. 6 Lah. 1 (P.C.).
2. (1926) 51 M.L.J. 269: I.L.R. 49 Mad. 849 (F.B.).

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the Judicial Committee in *Sat Narain* v. *Sri Kishen Das*: *Same* v. *Bank of Upper India*[1]. There their Lordships pointed out that although S. 52 (2) (*b*) of the Presidency Towns Insolvency Act entitles the Official Assignee to exercise the father's powers to sell the share of his son in the family property to discharge his debts such powers are subject to limitation.

S. 28 (2) of the Provincial Insolvency Act states:—

"On the making of an order of adjudication, the whole of the property of the insolvent shall vest in the Court or in a receiver as hereinafter provided, and shall become divisible among the creditors, and thereafter, except as provided by this Act, no creditor to whom the insolvent is indebted in respect of any debt provable under this Act shall during the pendency of the insolvency proceedings have any remedy against the property of the insolvent in respect of the debt, or commence any suit or other legal proceedings, except with the leave of the Court and on such terms as the Court may impose."

This section refers only to the property of the insolvent and the prohibition against the institution of legal proceedings without the leave of the Court refers to proceedings with regard to the insolvent's property. Although the right of an insolvent Hindu father to sell his son's share in the family property to discharge his own lawful debts vests in the Official Assignee or the Official Receiver as the case may be it does not follow that proceedings cannot be taken in respect of the son's interest in the family property without the leave of the Insolvency Court. The right to sell the son's interest only exists so long as the son's interests in the family property exists. If the interest has been sold or if there has been a lawful attachment, which has the same effect, there exists no property over which the power can be exercised.

The right of a creditor to proceed to attach a son's property notwithstanding the father's insolvency has been recognised by two Benches of this Court. In *Gopalakrishnayya* v. *Gopalam*[2], Ramesam and Devadoss, JJ., held that notwithstanding that on the insolvency of a Hindu father joint with his son the power of the father to sell the son's share in the family property passed to the Official Receiver in the insolvency, the Official Receiver is not entitled to exercise that power after there has been an attachment of the son's share by a creditor. The attaching creditor is entitled to proceed with the execution by selling the share of the son. In *Manickam Pillai* v. *Vallayya*

1. (1936) 71 M.L.J. 812: L.R. 63 I.A. 384: I.L.R. 17 Lah. 644 (P.C.).
2. (1928) 54 M.L.J. 674: I.L.R. 51 Mad. 342.

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Naicken (A. A. O. No. 253 of 1936) a decision which has not yet been reported, King and Krishnaswami Aiyangar, JJ., had to consider the direct question whether S. 28 (2) of the Provincial Insolvency Act prohibits an attachment of a son's share without the leave of the Insolvency Court. They held that it did not. The learned Judges in that case pointed out that all that the Official Receiver can do in respect of the property of the undivided sons of an insolvent is to exercise the power of the insolvent himself and sell that property to meet the insolvent's debt; but that power can be defeated at any time by any action taken by the sons themselves to dispose of their property or by any action taken by the sons' creditors against them. This principle was also recognised by Krishnan Pandalai, J., in *Chinna Veeriah* v. *Gurivi Reddi*[1]. In that case, after the adjudication of the managing member of a joint Hindu family a creditor filed a suit on a promissory note executed by the managing member. The suit was dismissed as against the insolvent and the Official Receiver, but was decreed as against the other members of the joint family. It was argued on appeal that the suit could not even be maintained as against the other members of the family on the ground that on the insolvency of the managing member the power to sell the whole of the family property to discharge the debts of the family vested in the Official Receiver as the property of the insolvent. The Court held that the creditor was not resorting to any property of the insolvent or trying to interfere with the power of the Official Receiver. The creditor was only seeking to realise his debt from the share of the son in the family property and therefore the suit was maintainable.

The learned advocate for the Official Receiver has quoted the decision of Pandrang Row, J. (sitting alone) in *Baluswami Naidu* v. *Official Receiver, Madura*[2]. The learned Judge does appear to have formed the opinion that in the case of the insolvency of a Hindu father S. 28 (2) of the Provincial Insolvency Act does prevent the creditors of a son from attaching the sons' share in the family property without the leave of the Insolvency Court. As I have indicated I do not share this view and as I have also indicated it is opposed to the decisions of two

1. (1933) 66 M.L.J. 277. 2. (1938) 1 M.L.J. 824.

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Benches of this Court: *Gopalakrishnayya* v. *Gopalam*[1] and *Manicka Pillai* v. *Vellaya Naicker* (A.A.O. No. 253 of 1936). The position is that while the interest of the son remains unsold or unattached the Official Assignee has the right to sell the properties for the lawful debts of the insolvent father, but unless he exercises his right he may lose it and he loses it if the interest of the son is attached by a creditor of the son.

For these reasons I hold that the decision of the District Judge is wrong and the decision of the Subordinate Judge should be restored. Accordingly I would allow the appeal with costs against the Official Receiver here and below.

Somayya, J.

Somayya, J.—I agree.

K.C. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING AND MR. JUSTICE ABDUR RAHMAN.

Natesa Padayachi .. *Petitioner (Petitioner—28th Defendant)*

v.

Krishna Padayachi and others .. *Respondents (Legal Representatives).*

Natesa Padayachi v. Krishna Padayachi.

Hindu Law—Reversioners—Suit by one making other reversioners defendants—If and when decree can be given for the share of defendant reversioners also.

In a suit by one of the reversioners for recovery of the estate alienated by the widow, making the other reversioners defendants and the defendant reversioners also asked for a decree for their share of the property and an issue was raised as to whether the alienations were binding on the plaintiff and the other reversioners, the Court ought to grant a decree in favour of the defendant reversioners also, in the absence of any special pleas raised by the contesting defendants as against the defendant reversioners, and subject to the suit being regarded as one filed by all the reversioners and costs being payable by them on that valuation.

Adhikari Vishnumurthaiyya v. *Authaiya*, (1918) 35 M.L.J. 153, distinguished.

Petition under S. 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Subordinate Judge of Kumbakonam dated 22nd August, 1930 and made in I.A. No. 262 of 1930 in O. S. No. 25 of 1927.

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1. (1928) 54 M.L.J. 674: I.L.R. 51 Mad. 342.

* C.R.P. No. 460 of 1931. 18th January, 1939.

R. Rajagopala Aiyangar for Petitioner.

S. Panchapagesa Sastri for Respondents.

The judgment of the Court was delivered by

Natesa Padayachi *v.* Krishna Padayachi.

King, J.

King, J.—This revision petition relates to a suit brought by one of two reversioners for partition of the estate left by one Kannu Padayachi which had in the meanwhile been alienated by his widow Sundaram to a number of alienees. The suit was decreed in part and dismissed in part. The plaintiff asserted in his plaint that he and the twenty-eighth defendant were joint reversioners with equal rights. The twenty-eighth defendant in his written statement supported the plaintiff's case and asked that a decree might be given for his share of the property. There was, however, no decree granted in favour of the twenty-eighth defendant and shortly after the decree was passed he applied for a decree in his own favour. This was refused by the learned Subordinate Judge and the question whether that refusal was right or wrong is now before us in this petition.

We have been referred to two rulings which deal with a somewhat similar situation, on the earlier one of which the learned Subordinate Judge has relied in refusing the twenty-eighth defendant his request. That is reported in *Adhikari Vishnumurthaiyya* v. *Authaiya*[1]. On the other hand there is a case reported in *Appalanaidu* v. *Annamnaidu*[2], in which the opposite view has been taken. The main reason in our opinion for the position in *Adhikari Vishnumurthaiyya* v. *Authaiya*[1] is given at p. 156 in these words:—

"When as in the present case plaintiff sues for his own share alone and not as representing co-owners, nothing regarding the latter's share is or can legitimately be decided."

That proposition cannot possibly apply to the present case. No doubt the plaintiff did sue for his own share and did not specifically ask that the twenty-eighth defendant's rights should be decreed in the suit. But throughout the whole of the pleadings no distinction is drawn between the plaintiff and the twenty-eighth defendant and when it came to the framing of issues we find the 5th issue framed in these words:—

"Whether the alienations in favour of the contesting defendants are true, valid and binding on plaintiff and twenty-eighth defendant."

1. (1918) 35 M.L.J. 153.

2. A.I.R. 1928 Mad. 555.

Natesa Padayachi v. Krishna Padayachi. — King, J.

The respondent to this petition argues that there could be no decree in favour of the twenty-eighth defendant because he has been given no opportunity of putting forward any separate defence which he might have to urge against the twenty-eighth defendant's claim. That contention must be rejected in view of the terms of this issue. It is quite clear that the respondent was called upon to plead and prove any fact which suggested that though any particular alienation might not be binding on the plaintiff, it was yet binding on the twenty-eighth defendant. He has made no attempt, as already stated, to differentiate between the plaintiff and the twenty-eighth defendant in any manner whatever nor indeed even in the affidavit which he filed against the twenty-eighth defendant's application after the decree had been given did he make any positive assertion regarding any special pleas which he might have raised against the twenty-eighth defendant's claim. It is therefore clear that in the present suit there has been a decision that in so far as alienations are not binding on the plaintiff they are also not binding on the twenty-eighth defendant and there seems to us no reason whatever why the twenty-eighth defendant should not have been given a decree equally with the plaintiff in regard to these particular alienations. The mere fact that he is styled twenty-eighth defendant and not the second plaintiff does not seem to us to be of any practical importance whatever. We therefore think that this revision petition ought, subject to certain conditions, to be allowed and that the decree for which the petitioner asks should be granted to him for his half share of what has been found by the learned Subordinate Judge to constitute the estate of Kannu Padayachi liable to division. The conditions are that the suit in the Court of first instance shall be regarded as if filed by plaintiff and the twenty-eighth defendant for the *whole* of Kannu Padayachi's estate and that costs are payable by both of them on that valuation. In regard to mesne profits the twenty-eighth defendant's claim shall be limited to mesne profits from 1927 onwards, that is to say, from three years before he made the application, which is now under discussion in this petition. Defendant 28 must also pay before this decree can be granted to him, the same court-fee as plaintiff has paid.

Each side will bear its own costs in this revision petition.

S. V. V. — *Revision allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE VARADACHARIAR.

Arathil Kandoth Madhathil Balakrishnan Nambiar .. *Appellant** (*3rd Defendant*)

v.

P. K. Chathu and others .. *Respondents* (*Plaintiff and Defendants 1 and 2*).

Bala-krishnan Nambiar *v.* Chathu.

Negotiable Instruments Act (*XXVI of 1881*), *S. 35—Person getting a promissory note drawn in his name—Indorsement in favour of the real creditor—Liability of the indorser, how far.*

Where the appellant advised the first respondent in the case to invest the latter's moneys on the security of immovable properties and assured him that he would make safe investments and the first respondent agreed to leave the entire investment in the hands of the appellant, and subsequently the appellant entered into a transaction with respondents 2 and 3 under which a promissory note was drawn by the respondents 2 and 3 in the name of the appellant who endorsed it over to the first respondent, and on failure of payment to the first respondent by the respondents 2 and 3 at the time mentioned in the promissory note the first respondent instituted a suit against respondents 2 and 3 as well as the appellant,

Held, that the appellant was liable because of the fact that he had the instrument drawn in his own name and from his letter of assurance to the first respondent of the safety of the money, he accepted the position of a guarantor also. S. 35 of the Negotiable Instruments Act provides that in the absence of a contract to the contrary the person who endorses and delivers a negotiable instrument before maturity without expressly excluding his liability is liable to the holder.

Appeal against the decree of the Court of the Subordinate Judge of Tellicherry in O. S. No. 13 of 1932.

O. T. G. Nambiar for Appellant.

M. C. Sridharan for Respondents.

The judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—The appellant appeals from a decree of the Court of the Subordinate Judge of Tellicherry holding him liable as the endorser of a promissory note executed by the second and third respondents and also as a guarantor of payment. In 1929 the first respondent had money which he wished to invest and got in touch with the appellant. On the 2nd May, 1929, the appellant wrote to the first respondent advising him to invest his money on the security of immovable property and assuring him that he could make safe investments on his behalf. On the

* Appeal No. 114 of 1933. 14th April, 1938.

Bala-krishnan Nambiar v. Chathu.

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11th May, 1929, the first respondent wrote to the appellant stating that if he could get proper security he would leave the matter of the investment of his monies entirely to the appellant. He stipulated that there should be interest at 12 per cent. per annum and the investment should be for six or twelve months. The correspondence clearly shows that the appellant's instructions were to invest on the security of immovable property. Instead of carrying out his instructions the appellant lent Rs. 4,500 of the first respondent's money to the second and third respondents on the promissory note in suit, without any security apart from the promissory note. The promissory note was drawn by the second and third respondents in the name of the appellant, who a month later endorsed it over to the first respondent.

On the 12th June, 1929, the appellant wrote to the first respondent a letter in which he said:—

"The money is as safe as in any bank and you can have it at a week or ten days' notice. You can rest assured on that point. To-day the party (merchants) is clearing Rs. 10,000 to Mr. M. Kannan Nambiar as it is the due date and I am arranging another loan for them. All is well; please don't worry in the least. Now, 27th is the due date of your money and you can be sure that I will come to Coorg with these men and clear the loan and interest after which you will be convinced about the safety of the transaction. This is the first of such a transaction you do, but this is not the 10th or 15th that I saw being done. Your money is quite safe. Please don't worry."

The second and third respondents did not pay when called upon to do so and the first respondent instituted a suit against them and the appellant on the 20th June, 1932. The claim against the appellant was not limited to his liability as an endorser. The plaint was sufficiently widely drawn to include a claim against him as a guarantor.

S. 35 of the Negotiable Instruments Act provides that in the absence of a contract to the contrary a person who indorses and delivers a negotiable instrument before maturity without expressly excluding his liability is liable to the holder. There was here no contract between the appellant and the first respondent when the endorsement was made. The promissory note was endorsed without any stipulation and without any communication with the first respondent. In these circumstances the appellant is liable on the instrument in suit. His learned advocate has argued that he is not liable on the ground that there was no consideration for the endorsement, and has relied

Bala-krishnan Nambiar v. Chathu. — Leach, C.J.

on the provisions of S. 43 of the Negotiable Instruments Act. We are unable to accept this contention. The consideration for the promissory note was the Rs. 4,500 paid by the first respondent and the endorsement of the instrument to the first respondent was part and parcel of the same transaction.

The appellant had deliberately disobeyed his instructions and had lent money on this promissory note without security. We consider that the fact that he had the instrument drawn in his own name shows that he intended to share the liability. He knew full well that if the first respondent was not satisfied with the security the blame would be on his shoulders as he had not carried out his instructions. Moreover, the fact that the appellant wrote to the first respondent saying that he would come with the borrowers and "clear the loan" leaves no doubt in our minds that he accepted the position of guarantor. In these circumstances the appellant cannot say that he is not liable.

For these reasons the appeal will be dismissed with costs.

K. C. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE LAKSHMANA RAO.

Markapuram Pedda Subbanna .. *Petitioner* (Accused).*

Subbanna, *In re.*

Criminal Procedure Code (V of 1898), S. 192—Offence under S. 29, Telegraphs Act—Plea as to want of jurisdiction upheld by Sub-Divisional Magistrate—Records submitted to District Magistrate—Power to transfer case to another Magistrate having jurisdiction.

The petitioner was charged before the Sub-Divisional Magistrate of Jammalamadugu under S. 29 of the Indian Telegraphs Act for causing a false message to be transmitted from Cudappah and his objection to the jurisdiction of the Sub-Divisional Magistrate of Jammalamadugu to try the case was upheld by the Sub-Divisional Magistrate The records were then submitted by the Sub-Divisional Magistrate to the District Magistrate who transferred the case to the Sub-Divisional Magistrate of Cudappah who had jurisdiction.

Held, that the order for transfer of the case was unsustainable and the case should be re-transferred to the file of the Sub-Divisional Magistrate of Jammala madugu for disposal.

In re *Sikka Goundan,* A.I.R. 1923 Mad. 326, relied on.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Inspecting Tahsildar First Class Magistrate,

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* Crl R. C. No. 257 of 1939. (Crl. R. P. No. 238 of 1939). 21st March, 1939.

Subbanna, *In re.*

Cudappah, dated 20th February, 1939, in C. C. No. 5 of 1938 and the order of the Court of the District Magistrate of Cudappah dated 17th November, 1938, in L. Dis. No. 1204-M-1938.

M. Ranganatha Sastri for Petitioner.

K. Venkataraghavachari for *The Public Prosecutor* on behalf of the Crown.

The Court made the following

ORDER.—The petitioner was charged before the Sub-Divisional Magistrate of Jammalamadugu under S. 29 of the Indian Telegraphs Act for causing a false message to be transmitted from Cudappah and his objection to the jurisdiction of the Sub-Divisional Magistrate of Jammalamadugu to try the case was upheld by the Sub-Divisional Magistrate. The records were then submitted by the Sub-Divisional Magistrate to the District Magistrate and the case was transferred by the District Magistrate to the file of the Sub-Divisional Magistrate of Cudappah who has jurisdiction. This as held in *Sikka Goundan, In re*[1], is not permissible and the order of transfer cannot be sustained. It is therefore set aside and the case is re-transferred to the file of the Sub-Divisional Magistrate of Jammalamadugu for disposal according to law.

B. V. V. ——— *Order set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW.

Darapureddi Jaggu Naidu and others .. *Accused.**

Jaggu Naidu, *In re.*

Child Marriage Restraint Act (XIX of 1929), S. 8—Enquiry under S. 10—If mandatory.

A preliminary enquiry under S. 10 is absolutely necessary before the Court can take cognisance of an offence under the Child Marriage Restraint Act, 1929.

Case referred for the orders of the High Court, under S. 438 (1) of the Criminal Procedure Code by the Additional District Magistrate of Vizagapatam in his letter dated 15th October, 1938.

The Public Prosecutor (V. L. Ethiraj) for the Crown.

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1. A.I.R. 1923 Mad. 326.

* Crl. R. C. No. 810 of 1938. (Case Referred No. 25 of 1938). 19th January, 1939.

Jaggu Naidu, *In re.*

The Court made the following

ORDER.—This is a reference made by the Additional District Magistrate of Vizagapatam recommending that the issue of process by the Sub-Divisional Magistrate, Paravatipur, in C. C. No. 152 of 1938 on his file, a case under S. 8 of the Child Marriage Restraint Act (XIX of 1929) may be set aside on the ground that the process was issued without holding an enquiry as required by S. 10 of that Act.

The position is indeed very clear that a preliminary enquiry is absolutely necessary before the Court can take cognisance of an offence under the Act. S. 10 is very clear on the point and the provisions of it are mandatory. The issue of process implies that cognizance was taken without any preliminary enquiry being held as required by S. 10. The issue of process is therefore unauthorised by law and must be set aside. It will now be open to the Joint Magistrate to hold the preliminary enquiry under S. 202 of the Criminal Procedure Code.

S. V. V. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE SOMAYYA.

Sri Emberumanar Jeer Swamigal .. *Appellant** (*Petitioner*)

v.

The Board of Commissioners for Hindu Religious Endowments, Madras and others .. *Respondents* (*Respondents*).

Sri Emberumanar Jeer Swamigal *v.* Board of Commissioners for H. R. E., Madras.

Certiorari—*Temple honours—Decision by Madras Hindu Religious Endowments Board—Settling order of precedence—No decision as to legal rights—Issue of writ of* certiorari *by High Court to quash Board's order—Permissibility—Madras Hindu Religious Endowments Act (I of 1925), S. 18.*

A question relating to the distribution of *theertham* or other temple honours cannot be made the subject-matter of a suit as it is not a question which affects a legal right. The Religious Endowments Board, however, has under S. 18 of the Madras Hindu Religious Endowments Act the power to settle questions relating to the allocation of honours in religious institutions over which it has superintendence and can settle the list setting out the order of precedence in which persons should receive the honours. But in settling such questions the Board acts in its administrative capacity and does not decide any legal right and the High Court cannot issue a writ of *certiorari* so as to modify or quash the order passed by the Board.

* L.P.A. No. 98 of 1936. 22nd February, 1939.

Sri Emberumanar Jeer Swamigal v. Board of Commissioners for H. R. E., Madras.

Appeal under cl. 15 of the Letters Patent against the order of the Hon'ble Mr. Justice Pandrang Row dated 19th August, 1936 and made in C.M.P. No. 3852 of 1935 presented to the High Court for the issue of a writ of *certiorari* to the Board of Commissioners for Hindu Religious Endowments, Madras, the first respondent herein calling for the records in M. A. No. 4 of 1935 and the connected proceedings in M. A. No. 9 of 1935 with the orders passed thereon by the said Board and to quash the order passed by the said Board in the said M.A. No. 9 of 1935.

V. Ramaswami Aiyar and *N. G. Krishna Aiyangar* for Appellant.

P. V. Rajamannar for 1st Respondent.

B. Sitarama Rao, A. Srirangachari, S. Narayana Aiyangar, S. Ramanujam, S. Rajagopalachari and *K. E. Rajagopalachari* for other Respondents.

The Court made the following

Leach, C.J.

ORDER. *The Chief Justice.*—This is an appeal from an order of Pandrang Row, J., refusing to issue a writ of *certiorari*. The appellant is the head of a math known as the Sri Emberumanar Jeer Math, which is situate in the village of Alwarthirunagari in the Tinnevelly District. In the math is a shrine and it is said that this shrine is a subsidiary shrine of the Sri Athinatha Alwar Temple which also lies within the village limits. The Sri Emberumanar Jeer Math is one of four maths which are particularly interested in the temple, the others being the Vanamamalai, Sri Ahobila and Thirukkurangudi Maths, the heads of which are respondents 7, 8 and 9. There has been great strife with regard to the right to receive *theertham* and other honours in the temple on festival and non-festival days. The quarrel commenced so long ago as 1905 and in that year a suit was filed in the Court of the Subordinate Judge of Tinnevelly by certain persons to establish what they claimed to be their right to recite in the temple the sacred texts. The appellant and the seventh respondent were defendants. The suit was dismissed and appeal filed against this decision met with a similar fate: *vide* the judgment in *Athan Sadagopa Chariar Swamigal* v. *Elayavalli Srinivasa Chariar*[1]. In the course of

1. (1913) M.W.N. 289.

Sri Emberumanar Jeer Swamigal v. Board of Commissioners for H. R. E., Madras.

Leach, C.J.

that suit the question was raised whether the present appellant or the seventh respondent, who is the head of the Vanamamalai Math, was entitled to precedence in the distribution of *theertham* on festival days. Sadasiva Aiyar, J., who delivered the main judgment on appeal considered that the seventh respondent was entitled to precedence and said so in his judgment, which was delivered on the 18th February, 1913.

The question as to the right of precedence continued to be agitated and in 1927 the Madras Hindu Religious Endowments Board took action. By an order dated 12th May, 1927, the Board settled a list setting out who should receive the honours on festival days and who should receive them on non-festival days. By this order the appellant was given the right to receive the honours first on non-festival days. The seventh respondent was dissatisfied with the Board's order, and on the 6th June, 1927, filed a suit on the Original Side of this Court (C. S. No. 306 of 1927). The defendants were the Madras Hindu Religious Endowments Board and the trustee of the temple. The seventh respondent asked for a declaration that the order of 12th May, 1927, was invalid. The suit was dismissed on the 21st September, 1932, on the ground that it was a suit relating merely to temple honours and involved no question of civil right. The seventh respondent appealed against this decision, but his appeal was dismissed on the 7th November, 1934. In 1930 respondents 2 to 6, who are said to be the disciples of the seventh respondent, filed a petition asking the Board to set aside its order of the 12th May, 1927. They claimed that they were entitled to the ninth place in the order of precedence on all days. On this ground they said that the Board should cancel in its entirety the order complained of and reopen the question. This petition was heard by three members of the Board, who by order dated the 6th April, 1935, declined to interfere with the order of the 12th May, 1927. Five days later respondents 2 to 6 filed another petition asking the Board to review its order of the 6th April, 1935, one of the grounds advanced being that the petitioners had not been given the ninth place to which they said they were entitled. This application, which was an application to review an order refusing to review a previous order, was heard by two of the three members of the Board who passed the order of the 6th April, 1935. This application succeeded and on the 15th May, 1935, the order of

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Leach, C.J.

the 12th May, 1927, was set aside. The result was that the trustees of the temple were directed to follow the observations by the Court in the appeal arising out of O. S. No. 22 of 1905 in respect of non-festival days, but no change was made so far as festival days were concerned. The appellant then became the dissatisfied party and on the 30th May, 1935, filed an application asking the Board to review its order of the 15th May, 1935. This application was heard by one member of the Board who on the 7th August, 1935, held that the Board had no power to review its own order. The application was accordingly dismissed. This led to an application to this Court by the appellant for a writ of *certiorari* with a view to the order of the Board of the 15th May, 1935, being quashed. This was the application dealt with by Pandrang Row, J.

We consider that the decision of the learned Judge refusing to issue the writ asked was right. It is acknowledged that a question relating to the distribution of *theertham* or other temple honours cannot be made the subject-matter of a suit as it is not a question which affects a legal right. By S. 18 of the Madras Hindu Religious Endowments Act, 1926, the Board is given the power of general superintendence of all religious endowments in the Presidency, excepting those within the City of Madras. The Board may do all things which are reasonable and necessary to ensure that maths and temples are properly maintained and that all religious endowments are properly administered and duly appropriated to the purposes for which they were founded or exist. It is not disputed that the Board has by virtue of this section power to settle questions relating to the allocation of honours in religious institutions over which it has superintendence, but in settling such questions the Board acts in its administrative capacity.

We are in entire agreement with the learned Judge when he says that it cannot be said that the Board's decision has declared any one's legal right or deprived any one of any legal right which he had and that the order of the Board complained of was merely an order dealing with the internal management of the temple. The issue of the writ of *certiorari* is a matter which lies within the discretion of the Court but in a case like the present one there is no question of discretion. It would obviously be improper to order the writ to issue.

The appeal will be dismissed with costs (one set).

B. V. V. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

K. M. Venkatachala Chetty .. *Appellant** (*Defendant*)

v.

N. D. Natesa Chetty .. *Respondent* (*Plaintiff*).

Venkatachala Chetty *v.* Natesa Chetty.

Partnership—Funds supplied by one partner—Amount spent in bribes by another—Moneys spent illegally not to be recognised in the ascertainment of partnership profits.

Where it was found that a partnership existed between the appellant and the respondent and the fact turned out that the appellant supplied funds for the purpose of the partnership and that the respondent applied a part of the funds so supplied in payment of bribes to certain officers,

Held, that illegal payments of this nature could not be taken into account in ascertaining the shares of profits of the partnership.

The appellant would not be entitled to debit the partnership with moneys which the respondent spent by way of bribes. The respondent also would not be entitled to obtain credit for the sums paid by him on bribes.

Joti Prasad v. *Hardwari Mal*, (1930) I.L.R. 53 All. 54, distinguished.

On appeal from the judgment of the Honourable Mr. Justice Wadsworth dated the 27th day of March, 1936 and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C. S. No. 538 of 1932.

G. Ramakrishna Aiyar for Appellant.

T. Krishnaraja Nayakar for Respondent.

The judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—The suit out of which this appeal arises was one for the dissolution of a partnership and for the taking of the accounts thereof. The respondent was the plaintiff. He claimed that in 1927 he and the appellant entered into a partnership for the purpose of supplying goods to jails and other institutions in this presidency, the appellant providing the finance and the respondent doing the work. The appellant denied that the relation between them constituted a partnership. His case was that the respondent was merely an employee who was to be remunerated on the basis of a share in the profits. The learned Judge held that there was in fact a partnership and passed a preliminary decree for the taking of accounts. In directing the Official Referee to take the accounts the learned Judge stated that any item of expenditure which was shown to be for an unlawful purpose was to be excluded. The reason for this direction was that bribes had been given to officials of various institutions in order to ensure that contracts were placed

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*O.S.A. No. 75 of 1936. 2nd May, 1938.

Venkatachala Chetty v. Natesa Chetty.

Leach, C.J.

with the partnership. The appellant contends that the learned trial Judge was wrong in holding that there was a partnership and that he also erred in giving this direction to the Official Referee.

The question whether a partnership existed is one of pure fact, and the evidence consisted merely of the oral testimony of the parties. The learned trial Judge who had the advantage of seeing the parties in the witness-box accepted the testimony of the respondent. We have not the advantage which the learned trial Judge had in this respect and before this decision can be varied it must be shown that he was not justified in his conclusion. No reason has been advanced why we should accept the appellant's word in preference to that of the respondent, and not having heard their evidence we must accept the decision of the learned trial Judge as being correct.

With regard to the direction of the learned trial Judge to the Official Referee, it appears that the appellant had himself paid bribes to officials and had entered those payments in the partnership books as items of expenditure. It also appears that the appellant supplied funds to the respondent for the purpose of the partnership and that the respondent applied part of the funds so supplied to him in payment of other bribes. The learned trial Judge was of the opinion that illegal payments of this nature could not be taken into account in ascertaining the shares of profits. In his opinion, if either party had been foolish enough to give a bribe in the hope that his partner would bear his share of the expenditure he could not use the Court to recover that share. We are in entire agreement with this decision.

The learned advocate for the appellant has quoted to us the case of *Joti Prasad* v. *Hardwari Mal*[1], but the facts of that case were quite different from the facts in the present case. There the partnership capital had been utilized for the payment of bribes with the consent of the partners and the money had left the firm for this purpose with their joint consent. Therefore it was not possible, without taking into consideration these outgoings, to decide the true position between the partners. In the present case, it is not a question of the partnership capital having been paid away in this way. The appellant wanted the Court to allow him to debit the partnership with moneys which he spent by way of bribes. He is not entitled to do so, and we

1. (1930) I.L.R. 53 All. 54.

consider the direction of the learned trial Judge, to be a very proper one. Just as the appellant will not be entitled to credit for the sums paid by him as bribes the respondent will not obtain credit for the sums paid by him in this way.

Venkatachala Chetty v. Natesa Chetty.

Leach, C.J.

The appeal will be dismissed with costs in favour of the respondent.

K.C. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW.

Pathuma Bibi and others .. *Petitioners**
(*Respondents 2 to 8*)

v.

Muthuswami Chettiar, minor by guardian Nallammal Achi through her authorised agent V. Nallathambi Chettiar .. *Respondent*
(*Petitioner*).

Pathuma Bibi v. Muthuswami Chettiar.

Insolvency—Petition by creditor to adjudicate debtor insolvent—Agreement by parties—Agreement providing that in a certain event the estate be automatically adjudged insolvent—If adjudication can be made by consent—Court's duty.

Adjudication as an insolvent cannot be brought about by consent of parties. Where therefore after some witnesses on the side of the petitioning creditor were examined, the parties came to an agreement which was filed in Court, in and by which a certain time was given to the counter-petitioners to pay a sum agreed between them and the agreement further provided that on failure so to pay within time, the estate of the counter-petitioners should automatically be declared insolvent, the Court cannot automatically adjudge the estate insolvent on failure to so pay as per the agreement. The Court must decide the liability of the estate to be adjudicated insolvent on the evidence that may be placed by the parties before it.

Petition under S. 75 of Act V of 1920, praying the High Court to revise the order of the District Court of Madura dated 23rd August, 1937 and made in C. M. A. No. 17 of 1937 (I. P. No. 49 of 1935, Sub-Court, Madura).

R. Gopalaswami Aiyangar for Petitioners.

K. V. Sesha Aiyangar for Respondent.

The Court delivered the following

JUDGMENT.—The petitioners in this petition are the heirs of one Pichaikanni Rowther who was sought to be adjudicated insolvent on an application by a creditor who is the respondent in this petition. The debtor died during the pendency of the petition and his heirs were brought on record. There was a

* C. R. P. No. 1570 of 1937. 25th November, 1938.

Pathuma Bibi v. Muthuswami Chettiar.

long delay before the trial began and after five witnesses had been examined on the side of the petitioning creditor the parties appear to have come to an agreement which is recorded in the following terms:—

"If the counter-petitioners pay the petitioner Rs. 1,100 from the estate of the Pichaikanni Rowther towards the amount due for decree and costs vagaira in O. S. No. 385 of 1935 on the file of the District Munsif's Court, Melur, within 16—2—1937 the decree must be deemed to be discharged, and the petition stands automatically dismissed. If the amount is not paid as above within the period as aforesaid, the petitioner shall be entitled to realise the entire amount due under the decree with full costs and interest and the estate of Pichaikanni Rowther shall automatically be declared insolvent with costs to the petitioner. To this effect have we agreed."

The petition was ordered to be called on 17th February in view of this agreement and as 17th February was declared to be a holiday for election, it was taken up on the 23rd February on which date the following order was passed:

"The petitioner-creditor's vakil brings to my notice that the amount as per endorsement has not been paid. The respondent's vakil says the parties want more time. It cannot be given. In the circumstances the deceased first respondent Pichaikanni Rowther is adjudged insolvent. The Official Receiver is appointed receiver of the estate. Time for discharge is six months. Costs of this petition to come out of the estate. Vakil's fee Rs. 10."

It will be seen from the final order passed by the Subordinate Judge that he was under the impression that because the parties had agreed that adjudication should follow automatically on the failure to make the deposit within the time allowed the only thing to be done in the circumstances was to adjudge the estate of Pichaikanni Rowther the deceased debtor insolvent. It is obvious that adjudication as insolvent cannot be brought about by mere consent of the parties. The fact that the agreement was filed in Court does not give it any further effect than it would otherwise have. This point is conceded by the learned Advocate who appears for the respondent before me and also in the judgment of the District Judge on appeal. The District Judge however was of opinion that because the learned Subordinate Judge had used the expression 'in the circumstances' in his final order he may be deemed to have considered the evidence already taken by him before he ordered the adjudication. Even assuming that this is the correct construction to be placed on this expression 'in the circumstances,' it does not follow that the adjudication should remain as it is because it is obvious that the present petitioners were not given any opportunity to adduce evidence to rebut the evidence adduced on the side of the petitioning creditor.

Apparently on the 23rd February, 1937, their vakil asked for more time to make the deposit and the learned Subordinate Judge refused to grant more time and straight away proceeded to adjudicate the estate as insolvent. It cannot be said therefore the petitioners had a reasonable opportunity to put forward evidence in support of their case. The order made without giving such an opportunity to one party cannot remain as it is. It is therefore set aside as well as the order in appeal; the learned Subordinate Judge should restore the petition to his file and dispose of it according to law, after giving both parties (it being not clear that the petitioning creditor had really closed his case on the 23rd February, 1937) opportunity to adduce evidence in support of their respective contentions. Costs in this Court and costs hitherto incurred in the Subordinate Judge's Court and in the District Court will be costs in the cause and abide the event, and should be provided for in the revised order to be passed by the learned Subordinate Judge.

Pathuma Bibi v. Muthuswami Chettiar.

S. V. V. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE SOMAYYA.

Khaji Dodda Khaji Sahib and others .. *Appellants** (*Appellants*)

v.

Chigamalla Nanjappa and others .. *Respondents* (*Respondents*).

Khaji Sahib v. Nanjappa.

Mosque—Religious worship—Right to perform—Muhammadans using a building on a site belonging to them as a mosque—Hindus' protest—Right of parties—Qualifications and limitations.

There is nothing unlawful in the Muhammadan community using a site, of which they are admittedly owners, for a mosque and the right to use it for a mosque is justified provided thereby in the performance of worship no material annoyance is caused to their neighbours, the Hindu community in the case.

Sesha Aiyangar v. *Sesha Aiyangar*, (1880) I.L.R. 2 Mad. 143, followed.

If the Muhammadan community utilises the building in a manner which does in fact create a nuisance then the law will interfere, but it cannot be said that the use of a building as a mosque will, of itself, amount to a nuisance.

Appeal under cl. 15 of the Letters Patent against the judgment and decree of the High Court dated 2nd November, 1936 and passed in S. A. No. 1194 of 1932 preferred against the decree of the District Court of Bellary in A. S. No. 13 of 1931 (O.S. No. 272 of 1929, District Munsif's Court, Hospet).

* L. P. A. No. 11 of 1937. 7th February, 1939.

Khajl Sahib v. Nanjappa.

V. S. Narasimhachar and *Basheer Ahmed Sayyed* for Appellants.

K. Umamaheswaram for Respondents.

The judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—The Muhammadan community of the village of Kunchur, Bellary District, owns a piece of land in the Hindu quarter of the village. Some years ago they proposed to erect on this land a Jumma Musjid, notwithstanding that there were already two mosques in the village. The proposal was greatly resented by the Hindus of the village, and in 1929 they filed a suit in the Court of the District Munsif of Hospet for an injunction restraining the defendants, who represented the Muhammadan community, from erecting the Musjid and a declaration of the unrestricted rights of the Hindus to hold religious, social, public and private processions "attended with music" along the route on which the proposed Jumma Musjid was to be built. The suit was strenuously contested. The defendants set up a contention that a mosque had been erected on the site in 19'0 but this had been demolished with a view to the construction of a new mosque. The District Munsif found that although the Muhammadans of the village had occasionally used the site for the purpose of offering prayers there had never been a mosque on the site and that it had never been intended that a mosque should be built thereon. In view of the feeling between the two communities he considered that it was not desirable that there should be a mosque on the site and although he allowed the construction of the new building to proceed, he issued an injunction restraining the defendants from using it as a mosque. At the same time he granted a declaration that the plaintiffs were entitled to take processions along this particular street. The defendants appealed to the District Judge, who by a judgment dated the 7th March, 1932, upheld the decision of the District Munsif. The defendants then appealed to this Court. The appeal was heard by Varadachariar, J., who confirmed the decrees of the lower Courts, but granted a certificate under cl. 15 of the Letters Patent permitting an appeal to a Bench. The appellants do not complain of the declaration granted by the District Munsif to the respondents, but they object to the injunction restraining them from using the building as a mosque.

That the Hindu community of Kunchur objects to the erection of a mosque on the site and that acute feeling will be aroused if the building is used as a mosque are not grounds which the law can recognise for the granting of the injunction. The Muhammadans of the village are admittedly the owners of the site and they wish to utilize it for the purpose of a mosque. There is nothing unlawful in using this site for a mosque and therefore they are entitled to utilize it for the purpose. The right in the appellants to use this site for a mosque is so clear that authority is hardly necessary, but there is authority and of this Court. In *Sesha Aiyangar* v. *Sesha Aiyangar*[1], Turner, C.J., and Forbes, J., held that in this country, where there is a great diversity of creeds, it would be intolerable if the members of a sect were not at liberty to erect a place of worship on their own property; because it was more or less contiguous to a place already occupied by a place of worship appertaining to another sect. The Court pointed out that the people of any sect are at liberty to erect on their own property places of worship, either public or private, and to perform worship provided that, in the performance of their worship, they do not cause material annoyance to their neighbours. A decision to the same effect was given by the learned Chief Justice and Muttuswami Aiyar, J., in *Parthasarathy Aiyangar* v. *Chinnakrishna Aiyangar*[2]. In *Kasim Ali Khan* v. *Birj Kishore*[3] (a case decided by the High Court, North-West Provinces, when Turner, C.J., was officiating as the Chief Justice of that Court) the learned Chief Justice observed:—

> "The land on which the temple is erected is the property of the respondents, and they are at liberty to build what structure they please upon it. Nor can the Courts by anticipation grant a decree prohibiting them against annoying the appellants. It must be shown that some substantial annoyance, and one which the Court can recognize, has been actually committed, before the Court will interfere."

These authorities were quoted to Varadachariar, J., but he did not consider that he was justified in interfering with the injunction which had been granted. In the course of his judgment he referred to the maxim *sic utere tuo ut alienum non laedas*, but this maxim can have no application here. A man must enjoy his own property in a manner which will not do injury to others, but the erection of a mosque on land owned by

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1. (1880) I.L.R. 2 Mad. 143.
2. (1882) I.L.R. 5 Mad. 304.
3. 2 N.W.P. Rep. 182.

Khaji Sahib v. Nanjappa.

Leach, C.J.

Muhammadans cannot be regarded as constituting an injury in law to persons of another creed. Of course, if the Muhammadan community utilizes the building in a manner which does in fact create a nuisance then the law will interfere, but it cannot be said that the use of a building as a mosque will amount to a nuisance.

Much has been said in argument with regard to the right of the Hindu community to hold processions along the street and it is said that if a mosque is erected attempts will be made to interfere with this right. This argument is really without foundation because the respondents have already obtained a declaration in their favour. The appellants have not challenged the respondents' right to this declaration and it is binding upon them. The case has to be decided from the point of view of legal right and there can be no doubt that the injunction which has been granted does infringe the rights of the appellants. It must therefore be dissolved.

I would, however, add this. The new building which has been erected on the site has up to now been used as a school. This is the result of the injunction granted by the District Munsif. The continuance of the use of the building as a school is a matter which the Muhammadan community of Kunchur might very well consider. They have, as I have already pointed out, two mosques in the village and it has not been suggested that these two mosques are insufficient for the Muhammadan community of Kunchur. The Court can, of course, give no direction in the matter. It can only suggest that the matter should receive the further consideration of the appellants, and in the interests of good feeling between the two communities we trust that it will.

The decree of the District Munsif will be varied by the omission of the injunction, but the declaration in favour of the respondents will stand. The appellants having succeeded with regard to the injunction are entitled to their costs in this Court and in the District Court. So far as the first Court is concerned the parties will pay their own costs.

K. C. ——— *Appeal partly allowed.*

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THE
FEDERAL COURT OF INDIA.

PRESENT:—SIR MAURICE GWYER, C. J. SIR SHAH SULAIMAN AND M. R. JAYAKAR, JJ.

IN THE MATTER OF THE CENTRAL PROVINCES AND BERAR SALES OF MOTOR, SPIRIT AND LUBRICANTS TAXATION ACT, 1938 (XIV OF 1938).*

The Government of India Act, 1935 (26 Geo. 5, Ch. 2), S. 100 and Lists I and II of Sch. VII—Conflict between Lists I and II—Reconciliation of—Excise in item 45 of List I—Meaning of—Taxes on sale of goods in item 48 of List II—If tax on retail sales of motor spirits and lubricants, an excise duty—Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938—If ultra vires *the Legislature of Central Provinces and Berar.*

S. 3 of the Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938 and all the provisions thereof levying "a tax on the retail sales of motor spirit and lubricants at the rate of five per cent. on the value of such sales" is not *ultra vires* the Legislature of the Central Provinces and Berar. It falls under Item 48 of List II of Schedule VII of the Government of India Act as "a tax on the *sale of goods*" and is not covered by Item 45 of List I of Schedule VII as a "duty of *excise*"

If a tax is covered by the Federal List (List I) and not covered by the Provincial List (List II) then the Provincial Legislature cannot impose such a tax and it will be invalid. If a tax is covered by the Provincial List and not covered by the Federal List, then the validity of the tax cannot be questioned. But if a tax falls within both the Lists, then such a tax will be *ultra vires* the Provincial Legislature by reason of the non-obstante clause in S. 100 (1). But it is a fundamental assumption that the legislative powers of the Centre and the Provinces could not have been intended to be in conflict with one another and the Court must therefore read them together and interpret or modify the language in which one is expressed by the language of the other, and arrive at a reasonable and practical construction of the language of the section so as to reconcile the respective powers they contain and give effect to all of them. It is only if such a reconciliation should prove impossible and only then will the *non-obstante* clause in S. 100 operate and the Federal power prevail, for the clause ought to be regarded as a last resort.

The term "*excise*" may have a wider meaning so as to include all duties levied on the consumption of the excisable commodity at any stage from production to sale but having regard to the context in which the expression is used and the scheme of the Act, and to avoid conflict with Item 48 of List II, the expression as used in Item 45 of List I must be construed as a power to impose duties of *excise* upon the manufacturer or producer of the excisable articles, or at least at the stage of, or in connection with, manufacture or production and that it extends no further. *Patton* v. *Brady,* 184 U.S. 608, distinguished and *Commonwealth Oil Refineries* v *South Australia,* 38 Com.L.R. 408, discussed. A clear distinction exists between the first sale and the last sale as the latter is not intimately connected with the manufacturer or producer while the former is.

*Reference No. I of 1938, 2nd December, 1938.

If "excise" should be given the wider meaning, then the only taxes that would not amount to excise duty and would be left over for the Province to impose under Item 48 of List II would be license-fees and certain turnover taxes, which will be merely illusory and that could not have been the intention of Parliament in using the words "taxes on the sale of goods".

The Constitution is not to be construed in any narrow or pedantic sense and the Court will have regard to the fact that the subject-matter of the interpretation is a constitution—a mechanism under which laws are to be made and not a mere Act which declares what the Law shall be. *James* v. *Commonwealth of Australia,* (1936) A.C. 578, per *Lord Wright* at p. 614 and *Attorney-General for New South Wales* v. *Brewery Employees Union,* 6 Com.L.R. 469, per *Higgins, J.,* at p. 611, referred to.

A general power ought to be so construed as not to make a nullity of a particular power conferred by the same Act and operating in the same field. *Citizens Insurance Co.* v. *Parsons,* 7 A.C. 96; *Bank of Toronto* v. *Lambe,* 12 A.C. 575 and *Attorney-General of Ontario* v. *Attorney-General of Canada,* (1912) A.C. 571, referred to.

If the words of a Statute confer a power they are not to be withheld on any extraneous grounds *Bank of Toronto* v. *Lambe,* 12 A.C. 575 at p. 586; *Attorney-General for Canada* v. *Attorney-General for Ontario,* (1898) A.C. 700 at p. 713 and *Brewers and Maltsters' Association of Ontario* v *Attorney-General for Ontario,* (1896) 1897 A.C 231 at p. 237, referred to

Per *Gwyer, C.J.* and *Jayakar, J* (*Sulaiman, J.,* doubting).—The proposals for Indian Constitutional Reforms known as the White Paper and the Report of the Joint Select Committee thereon are historical facts and their relation to the Constitution Act is a matter of common knowledge to which the Court is entitled to refer.

Per *Gwyer, C.J.* and *Sulaiman, J.* (*Jayakar, J.,* doubting).—The legislative practice in India preceding the Constitution Act may be looked into, for Parliament must surely be presumed to have had that in mind and unless the context otherwise clearly requires not to have conferred a legislative power in a sense not understood by those to whom the Act was to apply.

Per *Sulaiman, J.—Quaere*: Whether S. 297 (1) (*b*), Government of India Act, deals with the products of foreign countries. *Quaere*. Whether the word 'locality' in the sub-section should not be confined to localities in India, having regard to the marginal note to the section.

An intention to discriminate is not essential to invalidate a legislation under the sub-section, but it is sufficient if the provisions of the enactment result in discrimination.

Per *Jayakar, J.—Quaere*: Whether S. 297 (1) (*b*) does not posit a power to levy a tax on two sets of goods.

Reference by His Excellency the Governor-General to the Federal Court of India in the exercise of the powers conferred by S. 213 of the Government of India Act of the following question contained in the order of reference:

"Whereas it appears to me that the following questions of law have arisen and are of such public importance that it is expedient that the opinion of the Federal Court of India should be obtained thereon, now therefore, I, Victor Alexander John, Marquess of Linlithgow, Governor-General of India, hereby refer the said questions to the Federal Court of India for consideration and report thereon."

Questions.

Is the Central Provinces and Berar Sales of Motor Spirit & Lubricants Taxation Act, 1938, or any of the provisions thereof and in what particular or particulars or to what extent *ultra vires* the Legislature of the Central Provinces and Berar?

(Sd.) LINLITHGOW,

Viceroy & Governor-General.

On receipt of the reference, the Court directed the Governor-General in Council to file their case setting forth the facts and arguments on which they relied for the purpose of impugning the validity of the relevant enactment. They also directed the Government of the Central Provinces to file their case in reply. In pursuance of these directions the following case was filed on behalf of the Governor-General in Council:—

Case for the Governor-General in Council.

1. The question referred to the Court by the Governor-General is:—

Is the Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938, or any of the provisions thereof and in what particular or particulars or to what extent *"ultra vires"* the Legislature of the Central Provinces and Berar?

The reference has been made with the consent of the Government of the Central Provinces and Berar and the Governor-General in Council. The Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938, is hereinafter referred to as the "impugned Act".

2. The question has been put in a comprehensive form as it is desirable that the Court should have the whole of the Act before it and may decide the question on a consideration of the whole Act and having regard to the pith and substance thereof. The question is generally put in comprehensive terms (*Attorney-General for Canada* v. *Attorney-General for Ontario*, 1937 A.C. p. 355; *Ibid.* p. 368; *Ibid.* p. 377; *Ibid.* p. 391; *Ibid.* p. 405).

3. The circumstances leading up to this reference are as follows:—

(*a*) Motor spirit and lubricants are manufactured and produced in India and there is an actual or potential market for them in all parts of India.

(*b*) Though it is not essential for the purpose of deciding this reference, it is stated for the information of the Court that a portion of the motor spirit and lubricants sold in the Central Provinces and Berar is manufactured and produced in India.

(*c*) Before the Government of India Act, 1935, came into operation there was an excise duty on motor spirit imposed by the

Motor Spirit (Duties) Act, 1917, being an Act of the Central Legislature and such taxation still continues. There is no Central excise as yet on lubricants.

(*d*) Under Section 140 (1) of the Government of India Act, 1935, Federal duties of excise must be levied and collected by the Federation, although the proceeds of such duties may by an Act of the Federal Legislature be distributed amongst the units in accordance with such principles as may be formulated by the Act.

(*e*) The impugned Act was passed by the Legislature of the Central Provinces and Berar and it received the assent of the Governor on the 14th May, 1938.

4. The provision of the impugned Act material for the purpose of this reference is as follows:—

Section 3. (1) There shall be levied and collected from every retail dealer a tax on the retail sales of motor spirit and lubricants at the rate of five per cent. on the value of such sales.

5. The Governor-General in Council contends that the said provision is "*ultra vires*" the Legislature of the Central Provinces and Berar.

(*a*) It encroaches upon the Federal Legislative List scheduled to the Government of India Act, 1935, and also offends against Section 297 (1) (*b*) of the same Act.

(*b*) Section 100 (1) of the Government of India Act, 1935, deals with the Federal Legislative List and confers on the Federal Legislature exclusive power to legislate with respect to matters mentioned in that list notwithstanding any powers conferred on Provincial Legislatures by the Concurrent and Provincial Lists. The power conferred on the Provincial Legislatures to legislate with respect to matters in the Provincial List in Section 100 (Sub-section 3) is subject to the provisions conferring legislative power on the Federal Legislature by the two previous sub-sections.

(*c*) The Federal Legislative entry 45 is as follows:—

"Duties of excise on tobacco and other goods manufactured or produced in India except—

(i) Alcoholic liquors for human consumption;

(ii) Opium, Indian hemp and other narcotic drugs and narcotics; non-narcotic drugs;

(iii) Medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (*b*) of this entry".

(*d*) It is contended that the taxation imposed by Section 3 of the impugned Act,

(i) in so far as it may fall on motor spirit and lubricants of Indian origin, encroaches on the aforesaid entry 45, and

(ii) in so far as it may fall only on foreign motor spirit and lubricants, offends against the aforesaid section 297 (1) (*b*).

6. The competing entry is No. 48 of the Provincial Legislative List "Taxes on the sale of goods"; but by virtue of sub-section (3) of Section 100, which makes the powers of the Provincial Legislature subject to the provisions of the two preceding sub-sections, this entry must be read as if it ran "Taxes on the sale of goods, but excluding such taxes or duties as fall in the Federal Legislative List".

7. For example, a tax of, say, 50 per cent. on the sale of postage stamps or on the sale of railway tickets, though it may be said to fall within the description of "Taxes on the sale of goods", would be outside the scope of entry 48 of the Provincial Legislative List, because it falls in entry 7 or entry 58 of the Federal Legislative List. Similarly, the aforesaid entry 48 must be read as excluding any duty of excise falling within entry 45 of the Federal Legislative List.

8. There is no definition of "excise duties" in the Government of India Act, 1935, and hence the following definitions from standard authors are relied upon:—

1. (*a*) Stephen, in his Commentaries on the Laws of England (1928 Edition, Vol. IV, page 420) following Blackstone, says:

"Excise duties are those duties which are imposed by Parliament upon commodities produced and consumed in this country. They are directly opposite in their nature to the Customs duties, for they are an inland imposition, paid sometimes on the consumption of the commodity, frequently upon the retail sale".

(*b*) Judge Story, in his work on the Constitution of United States (Fifth Edition, Vol. I, Section 953) adopts almost identically the same definition.

"An inland imposition paid sometimes upon the consumption of the commodity or frequently upon the retail sale, which is the last stage before consumption".

(*c*) Palgrave in his Dictionary of Political Economy states:—

"The Excise is the name given collectively to those duties which in the fiscal system of the United Kingdom are levied upon commodities produced within the Kingdom itself, as distinguished from customs duties (*see* Customs) which are levied at the ports upon commodities imported from abroad. The word "excise" (Latin excido) signifies etymologically something cut off; as an excise duty may in effect be considered something cut off or deducted for the benefit of the State, from the price of the article as paid by the consumer. If there were no duty the consumer would pay a lower price for the article. The price, therefore, that he actually pays includes the duty; whence it follows that the duty itself is something deducted or subtracted from the actual price paid. The price in fact is divided

into two parts, one part being subtracted from the whole for the benefit of the state, and the remainder going to the vendor".

9. From these definitions it follows that a tax levied, *inter alia,* upon the retail sale of a home commodity and levied in such a manner as to enter into and form an identifiable part of the price of the commodity to the consumer is a duty of excise.

10. Reliance is also placed on the following cases which lead to the same conclusion:—

(*a*) *Commonwealth and Commonwealth Oil Refineries, Ltd.,* v. *South Australia,* (1926) 38 C.L.R. 408, where a tax of *3d.* on every gallon of petrol sold for the first time was held to be a duty of customs or excise and one of the Judges stated that an "excise duty means a duty on the manufacture, production, etc., within the country itself and it matters not whether the duty is imposed at the moment of actual sale or sale and delivery or consumption".

(*b*) *Patton* v. *Brady,* (184 U.S. 608), where it was held that a tax on manufacture of tobacco imposed at a period intermediate between the commencement of manufacture and the final consumption of the article is an excise tax.

(*c*) *Rex* v. *Caledonian Collieries,* (1928 A.C. 358), where it was held that the general tendency of an *ad valorem* tax upon the sale of a commodity is to enter into the price charged to the purchaser.

(*d*) *Attorney-General for British Columbia* v. *Kingcome Navigation Company, Ltd.,* (1924 A.C. 45, 57, 59) where "excise duties" have in effect been defined as indirect trading taxes on home commodities imposed in respect of some commercial dealing in those commodities such as their sale or production for sale

11. The effect of the definitions and decisions cited above is that the tax imposed by Section 3 of the impugned Act is a duty of excise to the extent to which it falls or may fall on motor spirit and lubricants produced in India, because

(1) it is imposed in respect of a commercial dealing in those commodities, namely, their retail sale, and

(2) it is imposed on such a basis that it is indirect taxation whose general tendency is to enter into the price of the commodities to the consumer.

12. Another criterion upon which reliance is placed is that laid down in *Croft* v. *Dunphy,* (1933) A.C. 156.

"When a power is conferred to legislate on a particular topic it is important, in determining the scope of the power, to have regard to what is ordinarily treated as embraced within that topic in legislative practice and particularly in the legislative practice of the State which has conferred the power".

The legislative practice of the United Kingdom in regard to duties of excise is sufficiently indicated by the extract from Stephen's Commentaries on the Laws of England reproduced in paragraph 8 (*a*) above. In support thereof, attention is invited to Section 48 (1) of the Finance (1909-10) Act, 1910 (10 Edw. 7, Ch. 8) which runs:—

"It shall be the duty of the Secretary of every registered club to deliver to the Commissioner, in the month of July in the year nineteen hundred and ten, and in the month of January in every subsequent year or within such further time as the Commissioners may in any case allow, a statement of the purchases during the preceding calendar year of intoxicating liquor to be supplied in or to the club or on behalf of the club to the members thereof, in such form and containing such particulars as may be prescribed by the Commissioners, and every such statement shall be charged with an excise duty of six pence for every pound of purchases shown in the statement."

Legislative practice in India is similar, duties or fees on retail sale being provided for in all the Provincial Excise Acts.

13. It follows therefore that even on the criterion of legislative practice, whether of the United Kingdom or of India, duties of excise may be levied at the sale stage as at any previous stages.

14. The tax being bad for the above reasons so far as it falls or might fall on Indian Motor Spirits and Lubricants, the effect of the legislation in question is exactly the same as if it were directed in terms only against foreign spirit and lubricants. In other words, the effect is to discriminate between Indian motor spirit and lubricants on the one hand and foreign motor spirit and lubricants on the other and any such discriminatory Provincial law offends against Section 297 (1) (*b*) of the Government of India Act, 1935 As part of the tax is bad the whole is bad.

In answer to this case the Government of the Central Provinces and Berar filed the following:—

Case for the Government of the Central Provinces and Berar.

PART I.

(1) Paragraphs 1 and 2—

It is admitted that the reference to the Court has been made with the consent of the Government of the Central Provinces and Berar and that this Government has no objection to the comprehensive form of the question submitted to the Court.

(2) Paragraphs 3 (*a*) and (*b*)—

It is admitted that motor spirit is produced and manufactured in India and it is believed that a portion of the motor spirit sold in the Central Provinces and Berar is produced and manufactured in India. It is, however, not known whether lubricants are produced or manu-

factured in India, although it is believed that none of the well-known brands is produced or manufactured in India.

(3) Paragraph 3 (*c*)—

The fact stated is admitted. Under the Motor Spirit (Duties) Act, 1917 (II of 1917), an excise duty is levied and collected at every manufactory in British India on all motor spirit produced in such manufactory.

(4) Paragraph 3 (*d*)—

The fact stated is admitted.

(5) Paragraph 3 (*e*)—

The position stated is admitted. Under Section 1 (3) of the impugned Act it will come into force on such date as the Provincial Government may by notification direct.

(6) Paragraph 4—

The statement is admitted.

(7) Paragraphs 5 (*a*) and (*d*)—

It is denied that Section 3 (1) of the impugned Act is ***ultra vires*** the legislature of the Central Provinces and Berar. It is further denied that the said provision encroaches upon the Federal Legislative List or offends against Section 297 (1) (*b*) of the Government of India Act, 1935.

(8) Paragraphs 5 (*b*) and (*c*)—

The statements as reproduced from Section 100 of the Government of India Act, 1935, and entry No. 45 of the Federal Legislative List are admitted.

(9) Paragraph 6—

(*i*) It is denied that entry No. 48 of the Provincial Legislative List, "Taxes on the sale of goods" must be read as if it ran "Taxes on the sale of goods but excluding such taxes or duties as fall in the Federal Legislative List".

(*ii*) The interpretation sought to be given to the opening words of sub-sections (1) and (3) of Section 100 of the Government of India Act, 1935, is not warranted either by the terms of the section or the scheme of distribution of legislative powers under that Act. Section 100 and the legislative lists thereunder must be interpreted according to the well-established canons of interpretation of the federal constitutions as laid down by the Judicial Committee of the Privy Council in the following cases:—

(*a*) *Citizens Insurance Company of Canada* v. *Parsons*, (1881) 7 A.C. 96.

(*b*) *Bank of Toronto* v. *Lambe*, (1887) 12 A.C. 575.

(*c*) ***Marriage Legislation in Canada***, In re, (1912) A.C. 880 at p. 887.

(*d*) *Great West Saddlery Company* v. *The King*, (1921) A. C. 91 at pp. 100 and 116.

(*e*) *Attorney-General for Ontario* v. *Reciprocal Insurers*, (1924) A.C. 328 at pp. 337, 345 and 346.

(*f*) *James* v. *Commonwealth of Australia*, (1936) A.C. 578 at p. 613.

(10) Paragraph 7—

The illustrations chosen are far from apposite Neither a postage stamp nor a railway ticket can be brought within the meaning of goods in entry No. 48 of the Provincial Legislative List read with the definition of this term in Section 311. The former is a stamp for revenue collected The latter is a receipt for the fare paid. So neither is a commodity sold.

(11) Paragraph 8—

The definitions of "excise duty" relied upon by the Governor-General in Council are either from or mainly based on the writings of the classical economists. They belong to a period when the theory and practice of sales tax were not well developed as in the post-war period. The definitions given are out of date. (*See* "Encyclopaedia Britannica", Vol. VIII, pp. 899, 905-906; Thirteenth Edition.)

(12) Paragraph 9—

It is denied that a tax levied on the retail sale of a home commodity, even it levied in such a manner as to enter into and form an identifiable part of the price of the commodity, is a duty of excise. In any case, the effect and incidence of a tax are problems of economic science and are not of any value in deciding the legality of a tax. What the Court is essentially concerned with is a question of law.

Reliance is placed upon the following observations of Lord Hobhouse in *Bank of Toronto* v. *Lambe*, (1887) 12 A.C. 575 at p. 582:—

". . . . . the excellence of an economist's definition will be measured by the accuracy with which it contemplates and embraces every incident of the thing defined. But that very excellence impairs its value for the purposes of the lawyer. The legislature cannot possibly have meant to give a power of taxation valid or invalid according to its actual results in particular cases. It must have contemplated some tangible dividing line referable to and ascertainable by the general tendencies of the tax and the common understanding of men as to those tendencies."

(13) Paragraph 10—

(*i*) Decisions bearing on the Constitution of Canada and U.S.A. regarding the interpretation of the terms based on ideas that existed at the time those Constitutions came into existence cannot be of any value in the interpretation of the terms of an Act passed in 1935.

The words of a statute have to be construed in the sense which they bore when it was passed. Reliance is placed upon the following cases:—

(*a*) Per Lord Esher in *Gaslight and Coke Co.* v. *Hardy*, (1886) 17 Q.B.D. 619 at p. 621.

(*b*) *The Longford*, (1888) 14 P.D. 34 at pp. 36-38.

(*c*) *Bank of Toronto* v. *Lambe*, (1887) 12 A.C. 575 at p. 583.

(*ii*) All the cases relied upon by the Governor-General in Council can be distinguished with reference to the exact signification of "Excise" as used in the enactments of the respective countries in contradistinction to that of the same expression as used in the Government of India Act, 1935.

(14) Paragraph 11—

It is denied that the essential elements of a duty of excise are as stated. It is further denied that the tax imposed by Section 3 of the impugned Act is an excise duty.

(15) Paragraphs 12 and 13—

(*i*) Legislative practice may be a useful but cannot be a conclusive test. Torn out of its fiscal and historical context legislative practice with respect to excise in England is positively misleading for the understanding of the same term in a recent enactment pertaining to India. The connotation behind the term "Excise" has never been something absolute and immutable. The term "Excise" in the Government of India Act, 1935, is not as comprehensive as in the English fiscal administration. A license to sell or carry a trade or occupation, taxes on animals and luxuries, which all come under "Excise" in the English legislative practice, have merited individual mention in the Provincial Legislative List under the Government of India Act and are given under separate heads outside excise.

Cf. Entry No. 40 with entries No. 47 and No. 50 of the Provincial Legislative List.

(*ii*) It is denied that the legislative practice relating to excise in India is the same as in England or that by virtue of entry No. 40 duties or fees on retail sales are provided for in the provincial Excise Acts. Licence fees on the vend of excisable articles are imposed by virtue of entry No. 31 read with entry No. 54 and duties of excise are not levied with respect to retail sales.

(*iii*) It is, however, contended that the method in which excise duty is collected is not an essential attribute of excise duty, and the mere fact that another but a totally different tax is collected on the same lines as an excise duty will not make that other tax an excise duty.

(16) Paragraph 14—

It is denied that either a part of the tax or the whole of it is bad. Section 297 (1) (*b*) has no application.

PART II.

In support of the contention of the Government of the Central Provinces and Berar that the impugned Act is not in any particular *ultra vires* the Provincial Legislature.

(17) The question referred to the Court can be answered properly by taking up the following points for determination:—

(*a*) Does the impugned Act fall under entry No. 48 of the Provincial Legislative List?

(*b*) If so, is there anything in the Federal Legislative List and more particularly in entry No. 45 of that list so as to cut down the full meaning of entry No. 48 of the Provincial Legislative List?

(*c*) Does the impugned Act offend against Section 297 (1) (*b*) of the Government of India Act, 1935?

Point A.—(18) The impugned Act falls under entry No. 48 of the Provincial Legislative List which is as follows:—

"Taxes on the sale of goods and on advertisements"

(19) There is no definition of sales tax in the Government of India Act, 1935. As can be gathered from the writings of eminent modern economists, a sales tax—

(i) is a tax on the transaction of sales of commodities whether imported or internally produced or manufactured; and

(ii) may be a tax on the sales of commodities in general with exemptions or on the sales of selected commodities.

Reliance is placed upon the following definitions:—

(*a*) "The term 'sales tax' or 'turnover tax' may refer to a general tax on all sales or only on particular commodities. It may as in France, include services, fees, commissions, interest, and other payments. A distinction is sometimes made between a sales and a turnover tax in that the latter refers to services as well as commodities, but there is in reality no clear distinction" [Findlay Shirras: Science of Public Finance Volume II, at p. 606—Third (1936) Edition.]

(*b*) ". . . . . . The base of the tax is the volume of sales or of gross receipts from sales. . . . The sales taxes now in effect are not easily classified. The most clearly defined type is the retail sales tax, which is levied upon the sale of tangible personal property at retail. The tax may apply to sales made by wholesalers and manufacturers as well as by retailers. Or it may be still broader in scope and apply to the sales of services by public utilities and to admissions, in addition to sales of tangible property". [Harley Leist Lutz: Public Finance, at pp. 631-632—Third (1936) Edition.]

(20) The Provincial Government contends that a duty of excise—

(i) is a tax on commodities produced or manufactured in the taxing state; and

(ii) is imposed on the production or manufacture of those commodities.

(*a*) "By 'excise' is ordinarily meant a tax or duty on home-produced goods, either in the process of their manufacture or before their sale to consumers, especially on spirits, beverages, gasoline, sugar and tobacco. It includes also certain licences, commodities, and licences to conduct certain trades. It is usual to exclude from excise sales or turnover taxes". (Findlay Shirras: Science of Public Finance, Volume II, at p. 652—1936 Edition.)

(*b*) *Commonwealth and Commonwealth Oil Refineries, Ltd.* v. *South Australia*, (1926) 38 C.L.R. 408, which is relied upon by the Governor-General in Council in support of his argument, itself contains observations *per* Justice Isaacs.

"Licences to sell liquor or other articles may well come within the excise duty law, if they are so connected with the production of the articles sold, or otherwise so imposed as in effect to be a method of taxing the production of the articles. But, if in fact unconnected with the production and imposed mainly with respect to the sale of goods, as existing articles of trade and commerce, independently of the fact of their local production, a licence or tax on the sale appears to me to fall into a classification of Governmental power, outside the true context of the words 'excise duties' as used in the Constitution".

(*c*) The ruling in *Peterswald* v. *Bartley*, (1904) 1 C.L.R. 497, is also relied upon.

Point B.—(21) Apart from all this discussion, a reading of the Government of India Act, 1935, shows that taxes on the sales of goods are dealt with separately from duties of excise. Entry No. 48 of the Provincial Legislative List deals with the former in contradistinction to the competing entry No. 46 of the Federal Legislative List and entry No. 40 of the Provincial Legislative List which deal with the latter. So within the meaning of the Government of India Act a sales tax is totally different from a duty of excise. So there is nothing in the Federal Legislative List to cut down the full meaning of entry No. 48 of the Provincial Legislative List.

Point C.—(22) Section 297 (1) (*b*) of the Government of India Act, 1935, has no application. If the Governor-General in Council's argument that a sales tax on home commodities is outside the legislative competence of the Provinces is correct, then the only power remaining under entry No. 48 of the Provincial Legislative List is to impose a tax on the sales of imported goods. So if the Central Provinces and Berar Legislature cannot under Section 3 of the impugned Act tax the sales of home-produced motor spirits and lubricants at all,

its taxing the sales of imported motor spirits and lubricants cannot give rise to any question of discrimination against the latter. According to the Governor-General in Council's own argument the Provincial Legislature cannot in the same breath contravene Section 297 (1) (*b*) by exercising the only power left to it under entry No. 48 of the Provincial Legislative List.

(23) The result of the foregoing analysis is as follows:—

(i) Sales tax and excise duty are different—one is a tax on a transaction and the other a tax on a commodity.

(ii) That Parliament intended entry No. 45 of the Federal Legislative List and entry No. 48 of the Provincial Legislative List to be mutually exclusive is apparent from the fact that the stages at which the tax falls under the two entries are clearly demarcated. Under the former the tax is imposed at the stage of *manufacture or production* while under the latter the tax is levied at the *sale*.

(iii) Legally there is no competition between entry No. 48 of the Provincial Legislative List and entry No. 45 of the Federal Legislative List. Such competition as is suggested arises only if we add the word "sold" in entry No. 45 of the Federal Legislative List after the words "manufactured or produced". For the contention of the Governor-General in Council to prevail entry No. 45 of the Federal Legislative List must be read as if it were as follows:—

"Duties of excise on tobacco and other goods manufactured, produced or *sold* in India except, etc."

The effect will be to read into an Act of Parliament words which are not there. This cannot be done—[*per* Lord Mersey in *Thompson* v *Gould and Co.*, (1910) A.C. 409 at p. 420].

(iv) Entry No. 45 of the Federal Legislative List and entry No. 48 of the Provincial Legislative List relate to distinct and different spheres of legislative activity. Within each particular sphere the respective legislature is supreme. There is no over-lapping and the field is clear. So the controlling words—"subject to the two preceding sub-sections" in sub-section (3) of Section 100 of the Government of India Act, 1935, do not come into play at all.

(v) (*a*) It is implied in the statement of the Governor-General in Council that a tax on the sale of goods which are imported from abroad will not be *ultra vires* the Provincial Legislature provided that such goods are not produced or manufactured in India If goods on which import duties are leviable can be covered by entry No. 48 of the Provincial Legislative List, there is no reason why goods on which excise duties are leviable by the Federal Government should be excluded.

(*b*) The argument of the Governor-General in Council if pressed to its logical extremity, may lead to an absurdity and there can never be a sales tax at all. This could never have been intended by

Parliament when it conferred on the Provincial Legislature a power to levy a sales tax under entry No. 48 of the Provincial Legislative List.

(vi) Entry No. 45 of the Federal Legislative List cannot be so interpreted as to render nugatory not only entry No. 48 of the Provincial Legislative List, but even entries Nos. 46 and 50. The correct principles of construction in the interpretation of Section 100 of the Government of India Act, 1935, and the legislative lists thereunder are those laid down in *analogous* conditions on the interpretation of Sections 91 and 92 of the British North America Act, 1867, by their Lordships of the Judicial Committee of the Privy Council.

(*a*) "Notwithstanding this endeavour to give pre-eminence to the dominion parliament in cases of a conflict of powers, it is obvious that in some cases where this apparent conflict exists, the legislature could not have intended that the powers exclusively assigned to the provincial legislature should be absorbed in those given to the dominion parliament" [*per* Sir Montague Smith in *Citizens Insurance Company of Canada* v. *Parsons*, (1881) 7 A.C. 97 at p. 108].

(*b*) Again in the same case at page 109 "It could not have been the intention that a conflict should exist; and, in order to prevent such a result the two sections must be read together, and the language of the one interpreted, and, where necessary, modified, by that of the other. In this way, it may, in most cases, be found possible to arrive at a reasonable and practical construction of the language of the sections, so as to reconcile the respective powers they contain, and give effect to all of them".

(*c*) "If they find that on the due construction of the Act a legislative power falls within Section 92, it would be quite wrong of them to deny its existence because by some possibility it may be abused, or may limit the range which otherwise would be open to the dominion parliament" [*per* Lord Hobhouse in *Bank of Toronto* v. *Lambe*, (1887) 12 A.C. 575 at p. 587].

(24) It is maintained that the impugned Act is *intra vires* the legislature of the Central Provinces and Berar.

As other Provinces besides Central Provinces were also interested in the decision of the question under reference, the Court gave notice to the other Provinces also under the terms of Order XXXIII Rule 1 of the Federal Court Rules and in pursuance of the directions of the Court the Provinces of Madras, Bengal and Assam; the United Provinces, Behar and Orissa also filed cases supporting the contentions of the Government of Central Provinces and Berar.

Sir B. L. Mitter with *S. M. Chaudhuri* and *A. K. Ahmed* for the Governor-General in Council.

W. R. Puranik, Advocate-General, with *Mahomed Hidayatullah* and *E. M. Joshi* for C. P. and Berar.

Sir A. K. Roy, Advocate-General, with *H. K. Basu* for Bengal and Assam.

Sir A. Krishnaswami Aiyar, Advocate-General, with *N. Rajagopala Iyengar*, for Madras.

Dr. N. P. Asthana, Advocate-General, for the United Provinces.

Baldeo Sahay, Advocate-General, for Bihar.

B. K. Ray, Advocate-General, for Orissa.

Sir B. L. Mitter:—The enactment in controversy is one passed by the Legislature of the Central Provinces. The issue before the Court is whether there is an overlapping between the two lists—1 and 2, in Schedule 7, and if so, which is to prevail? The main contention of the Governor-General in Council is that Section 3[1] which is the main section of the Act is "*ultra vires*" the Provincial Legislature. The term "retail dealer" is defined in Section 2 (*e*)[2]. The tax in question is one on retail sales. The propositions I contend for are these:—

(1) A tax on the sale of an article is a tax on the article itself.

(2) This tax is one in relation to a commercial dealing.

(3) Inasmuch as the tax is *ad valorem* there is a tendency to pass on the tax to the purchaser, that is, the tax enters into the price of the article. Look at the real nature of the tax, its pith and substance. It is an indirect tax on the goods. The contention of the Governor-General in Council is that the tax is a duty of excise within the Entry 45 of List I. The contention of the Central Provinces on the other hand is that it is a tax on the sale of goods. Excise is a tax on home-produced goods. The words that follow in Entry 45 "manufactured or produced in India" merely emphasise the meaning which is already implicit in the expression "Excise". "India" is defined in Section 311. It is common ground that petroleum is produced at Attock in the Punjab, and in Assam and that Indian produced oil is sold in the Central Provinces and would be subject to this tax. This is a tax or duty on goods manufactured or produced in India There is a difference between a tax and a duty. "Tax" has a larger connotation than "duty" both generally and in the Indian practice. *See* Schedule Tax Rules under the Government of India Act, 1919 and the definition of "Taxation" in Section 311. "Duty" is different from a "tax" in that it is imposed on commodities while "taxes" are imposed on individuals.

The Chief Justice:—Ultimately it is only an individual that will pay it.

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[1] *Section* 3. There shall be levied and collected from every retail dealer a tax on the retail sales of motor spirit and lubricants at the rate of five per cent. on the value of such sales.

[2] *Section* 2. (*e*) "Retail dealer" means any person who, on commission or otherwise, sells or keeps for sale motor spirit or lubricant for the purpose of consumption by the person by whom or on whose behalf it is or may be purchased;

(*f*) "Retail sale" means a sale by a retail dealer of motor spirit or lubricant for the purpose of consumption by the person by whom or on whose behalf it is or may be purchased.

Sir B. L. Mitter:—This distinction between duty and tax is not universal.

The use of the term "Excise" in England is not scientific and several imposts not strictly "excise" are included in the term in English fiscal administration. "Duty of excise" is a term of art, in law and in economics. The term "Excise" has various connotations. Prior to 1934 it was understood to mean an internal indirect tax on home-produced goods. In 1934 the Privy Council added the qualification that the tax must be one in relation to a commercial dealing. See *Attorney-General for British Columbia* v. *Kingcome Navigation Co*. 1934 A.C. 45 at pages 56 and 57; *see also Attorney-General for British Columbia* v. *Canadian Pacific Ry. Coy.*, 1927 A.C. 934 at p. 937; *Rex* v. *Caledonian Collieries*, 1928 A.C. 358; as to the tax entering into the price of the commodity, *see Lower Mainland Dairy Products Sales Adjustment Committee* v. *Crystal Dairy Ltd.*, 1933 A. C. 168.

The Chief Justice:—Take it that this is an indirect tax. Do you then say that it must be an Excise because it is indirect?

Sir B. L. Mitter:—I will say that it is not within the Entry 48 of the Provincial List. It is a case of the matter falling within both Item 45 of the Federal List and Item 48 of the Provincial List. If it is so, my contention is that the overlap belongs to the Centre. I concede that it is a tax on the sale of goods, but there are sale taxes which are excise and those which are not. For example, a turnover tax is not excise. My contention is that if it is an excise then it is excluded to the Provinces by reason of Entry 45 of the Federal list. This depends upon the construction of Section 100 of the Act.

Sir Sulaiman, J.:—How do you then give any meaning or scope to Entry 48 of the Provincial List.

Sir B. L. Mitter:—A tax on a "turnover" is within that Item 48. It is not "excise" because the tax is not identifiable in the price.

The wording of a taxing enactment is not conclusive. The Court will look at the substance of the Legislation, its real import. *See Attorney General for Ontario* v. *Reciprocal Insurers*, 1924 A.C. 328 at p. 337; *Gallagher* v. *Lynn*, 1937 A.C. 863.

The Chief Justice:—How do you reconcile, *Attorney General for British Columbia* v. *Canadian Pacific Ry. Co.*, 1927 A.C. 934 with *Attorney General for British Columbia* v. *Kingcome Navigation Co., Ltd.*, 1934 A.C. 45?

Sir B. L. Mitter.—The distinction is that in the latter case no commercial dealing took place.

Section 140 of the Government of India Act is designed to avoid multiplicity of taxes and to ensure a fair adjustment between the Provinces of the proceeds of excise duty. The construction contended for by the Provinces would lead to this further trouble that the Province which produces the goods would be enabled to tax the consumers in the other Provinces.

As to the constituent element of an excise, *see* quotation from Stephen's Commentaries on the Laws of England and Story on the Constitution of the United States cited in the case for the Government of of India. Entry 48 of the Provincial List is general and is wider than the entry relating to excise in Entry 45 of the Federal List. Therefore to the extent that a sale tax is a duty of excise it is excluded from the Provincial power.

The term "excise" has been used in a wider sense before the Government of India Act, 1935 and even prior to the Government of India Act, 1919. *See* C. P. Excise Act, 1915, Ss. 18 and 25. If so, taxes at the stage of the sale are included within the meaning of the expression "excise". The decision of the High Court of Australia in 38 Commonwealth Law Reports 408 supports my contention. In order to fall under Item 45 a tax need not be on the process of manufacture or production. If the goods which are the subject-matter of the tax are manufactured or produced in India, any indirect tax levied on them prior to their consumption is excise. A tax on general sales however would be within provincial competence as falling within Entry 48 of the Provincial List and does not trench on Entry 45 of the Federal List, because such a tax does not enter into the computation of the price of the article.

Sir Sulaiman, J.:—Is there any other illustration that you can give of the scope of Entry 48?

Sir B. L. Mitter:—Licences for carrying on trades. *See Clarke* v *Deuxamter*, (1922) South Africa Law Reports 264, a case of a licence duty varying with the amount of the turnover.

If a provincial tax is bad in regard to home-produced goods as falling within entry 45 of the Federal List, the tax even with regard to foreign imported oil, petrol and lubricants would be bad as offending the rule against discrimination within Section 297 (1) (*b*).

Jayakar, J.:—If according to you the only power of the Province is to levy a tax only on one set of goods and not on another how can any question of discrimination arise?

Sir Sulaiman, J.:—Suppose the tax were levied on the sales of Radio sets.

Sir B. L. Mitter:—It might be good because no Radio sets are manufactured in India.

Sir Sulaiman, J.:—But according to your contention the Legislation suddenly becomes bad as soon as some one starts a business of manufacturing Radio sets in India.

W. R. Puranik, A. G., for Central Provinces and Berar:—The term "excise duties" occurs in both the Federal as well as the Provincial Lists. Parliament therefore contemplated the sales tax as something different from a duty of excise under the Provincial Legislative list. The construction of the Government of India involves the reading into Entry 45 of the Federal List the words "and on the sale of goods". Such a process is not a permissible rule of construction. *Thompson* v. *Gould & Co.*, 1910 A.C. 409 at p. 420.

With the language of the items in the present Act might be compared the provisions under the Government of India Act, 1919. *Vide* Devolution Rule 16 under the Government of India Act, 1919; compare Item No. 31 in lists 1 and 2.

The definition of economists of the term "excise" is neither permissible nor helpful but if permissible it is really in favour of the contention of the Provinces. *See* Findlay Shirras, Volume II; "Encyclopædia Britannica", Volume No. (14th Edn.) p. 855; *Peterswald* v. *Bartley,* 1 C.L.R. 497, at 504, 508; *Common Wealth and Common Wealth Oil Refineries Ltd.* v. *South Australia,* (1926) 38 C.L.R 408 at 422 and 426.

The lists are meant to be mutually exclusive and whenever in the Provincial or Concurrent List they wish to exclude any portion of an entry in the Federal list the framers of the Act said so explicitly. *See* List No. 2, Entries 18, 23, 29, 33 for example.

The tax on an article is distinct from a tax on a transaction The impugned tax is on the commercial transaction of sale.

So far as the Legislative practice in India is concerned that which obtained previously to the Government of India Act, is entirely in favour of the Provinces. C. P. Act, II of 1915, has been misread by the other side. *See also* Bombay Act V of 1878. Section 19-A, Bengal Act, V of 1909, Chapter V, especially Sections 27 and 28, Punjab Act, I of 1914, U. P. Act, IV of 1910 and the Burma Act, IV of 1917. Moreover, the Central Excise Acts clearly show that excise is a tax which is levied at the stage of manufacture or production *See* Cotton Duties Act, II of 1896, Section 6; Motor Spirit Duty Act, II of 1917, Ss. 3 and 4; Sugar Excise Act, XIV of 1934, Steel Duties Protection Act, 1934. These show that duties at the stage of the sale were never included in the term "excise" and the legislative practice is really in favour of a limited meaning being given to the expression "excise".

As to the interpretation of Section 100 of the Government of India Act reference was made to the analogy of the construction of Sections 91 and 92 of the British North America Act. *Marriage Legislation in Canada* in re (1912) A.C. 880.

The Chief Justice referred to the language of Section 100.

Sir Sulaiman, J.—The distinction between the Canadian Constitution, Sections 91 and 92 and the Government of India Act is that matters of local or private nature are outside the Dominion field in Canada but not so here.

Mr. Puranik:—The argument of the other side renders Entry 48 of the Provincial List entirely nugatory and without any scope for operation for if their argument is correct a tax on foreign goods might be said to be a customs duty while a tax on home-produced goods is said to be an excise duty. Between Entries 44 and 45 of the Federal List the Provincial power under Item 48 is nullified.

Before S. 297 can come into play there must be a capacity to discriminate. *Attorney-General for British Columbia* v *Kingcome Navigation Ltd.*, 1934 A.C 45 at p. 60 is in my favour. As to the plenary powers of the Provinces, *see Great Western Saddlery Co.* v. *The King*, (1921) 2 A.C. 91 at pp. 100 and 116; *Attorney-General for Ontario* v. *Reciprocal Insurers*; 1924 A.C. 328 at pp. 345 and 346. Our contention therefore is that C. P. Tax Act which is impugned is within the Provincial power.

Sir A. K. Roy:—Advocate-General of Bengal:—The Advocate-General for the Federation concedes that the impugned tax comes within Item 48 of the Provincial List This tax nowhere mentions or even refers to the place of the origin of the goods and it is a tax which is payable by the retail seller who is not concerned with the manufacture or production of the goods. I concede that if there is an overlap between an entry in the Federal and Provincial Lists the Federal List predominates. Items 46, 47 and 50 would fall within the definition of "excise" under English Law The specific enumeration of these items clearly shows that the term "excise" is not used in the sense which it bears in English fiscal administration. Even Entry 49 of the Provincial List would, if the argument of the other side be accepted, be hit at by the Federal Item 45. Item 45 of the Federal List and Item 40 of the Provincial List show how the term "excise" is to be understood. It is a tax connected with the manufacture or production of the goods.

The Chief Justice:—In Item 40 why is mention made of countervailing duties? Why is not sale tax sufficient?

Sir A. K. Roy:—A pure and differential sale tax would be hit at by Section 297 as discriminatory.

The essence of the distinction between an excise and a sales tax is that an excise is a tax on manufacture or production while sales tax is on the transaction of sale at a stage later than production. As to the previous history and legislative practice, *see* Devolution Rule 3, Items 11, 19. 21 and Item 16.

The implications of Section 297 are in my favour. That Section itself shows that the Provinces were empowered to impose a tax on goods produced in India or outside India, provided there was no discrimination in the application of the provisions.

You must give some meaning to Entry 48. The Advocate-General of India is unable to give any illustrations except a turnover tax.

Sir Alladi Krishnaswami Iyer, Advocate-General of Madras:—The item "taxes on the sale of goods" does not occur either in the Canadian, Australian or the United States Constitution. The scheme of the division of the taxing powers in the constitution of those countries are entirely different from that under the Government of India Act,

Under the Canadian Constitution the Dominion Parliament is clothed in general terms with powers to raise money by any mode or system of taxation—*vide* item 3 of Section 91 of the British North America Act. But there is a limited power of taxation so far as Provinces are concerned. "Direct taxation within the province in order to the raising of a Revenue for Provincial purposes"; Also to "make laws *in re* shop, saloon, tavern, auctioner and other licenses in order to the raising of a revenue for provincial, local or municipal purposes."

Therefore a licence which would be an "excise" within the meaning of the American constitution is not an 'excise' according to the Canadian constitution According to Item 9 of Section 92 of the Canadian constitution the levying of a license fee would be within the purview of the powers of the Provincial Legislature and would not be treated as an indirect tax so as to bring it within the exclusive power of the Dominion Legislature.

For the scheme of the Australian system, *see* Sections 86, 51-and 90 of the Commonwealth of Australia Act. The High Court of Australia has not adopted the meaning of "excise" as understood in English Law as applying to the construction of their constitution See *Peterswald* v *Bartley,* 1 C.L.R. 397.

The term has been used in America in its widest sense—as meaning a tax on any privilege or incident or rights of ownership. An inheritance tax has been held to be an excise-tax. *See* Willis, Constitutional Law of the United States.

Therefore the cases decided with reference to the language of the constitution of those countries and Dominions could at best have a remote bearing and are not of any very great assistance.

For the first time in India, a unitary Government had been converted into a Federal system and autonomous Provinces had been created. For these autonomous units to exist and thrive, adequate financial resources were necessary and for that purpose they had been given the powers of taxation mentioned in the Provincial Legislative list. The main sources of Provincial revenue were land revenue and excise on liquor. It was a well-known fact, that land revenue was an inelastic source, and Parliament knew and must have anticipated the decrease and ultimate extinction of excise revenue, on account of the policy of prohibition in the Provinces These were surrounding circumstances which the Court might take into account in construing the Constitution. In order to supplement the slender resources of the Provinces they were allotted this source of revenue in Item 48 of the Provincial List. The sales tax is essentially a post-war tax and it came into vogue when in the depression which followed the post-war period European countries were forced to seek new sources of taxation. *See* Allan Comstock: Taxation in the Modern State. It must be taken that Parliament intended the Provinces to have this new source of revenue in order to finance the Nation-building activities entrusted to them under the Constitution.

The essence of an excise duty is that it is a tax on manufacture or production, or on the manufacturer or producer of internal goods; while a tax on the retail sale of goods has nothing to do with manufacture or production. Such a tax could not therefore be said to be an excise duty in any sense. The proper way of approaching the question of the construction of the entries in the lists is in an endeavour to reconcile the two lists, if there was any apparent conflict between them, and not to wipe out the provincial item, which would in effect be the construction of the Government of India.

There is no essential difference in the construction of the lists in the Government of India Act and in the construction adopted by the Privy Council of Sections 91 and 92 of the British North America Act. The opening words of Section 100 (1) of the Government of India Act, 1935, though slightly different in language are of precisely the same legal effect as the words in the opening portion of Section 91 of the Canadian enactment, namely, "notwithstanding anything contained in this Act" which necessarily includes anything contained in any of the items enumerated in Section 92 and the words "shall be exclusively possessed by the Dominion Paliament" at the same place in the section. I would even go a step further and say that the words in the Canadian enactment are stronger in favour of the Dominion power than the corresponding words in favour of the Central Government under Section 100 for the concluding portion of Section 91 expressly states that no matter which is specifically enumerated in any of the items which have gone before, namely, the 29 items referred to and enumerated as items over which the Dominion Parliament have exclusive legislative power "shall not be deemed to be of matters of-local or private nature" within the meaning of Section 92 and are therefore specifically excluded from the provincial power. Such specific words of exclusion are not in our enactment. So in any event the case for the Government of India cannot be stronger than that of the Dominion under the British North America Act.

Under the British North America Act it has been repeatedly held by the Privy Council, ever since the case of *Parsons*, 7 A.C. 96, that the two lists must be read together and the language of the one restricted or modified in the light of the other. It is only when even after this process of construction the Court finds that the items are irreconcilable that the dominance of the federal legislature comes in. In *Bank of Toronto* v. *Lambe* 12 A.C. 575, the question was the-validity of a provincial legislation imposing a tax on the paid up-capital of companies. The "raising of money by any method of taxation" is a subject enumerated in Section 91 while "direct taxation within the Province for a provincial purpose" is a provincial power and the question was whether the provincial power was overborne by the general words in which the dominion power was couched. Their Lordships of the Privy Council held that the general words of a dominion power must be-read restrictively so as to afford scope to the exercise of provincial powers. The most striking illustration of this rule is the case which related to the validity of provincial legislation on the subject of marriage. The

head of dominion power is entitled "Marriage and Divorce," words of the widest import which would take in every legislation with respect to the validity of the marriage contract and the whole law relating to marriage. Among the subjects enumerated as the subjects of provincial power is "solemnisation of marriage". The question in *Marriage Legislation of Canada* in re, 1912 A.C. 880, was whether the legislation of a Provincial Legislature in regard to certain requirements as to solemnisation in order to render a marriage valid was within the provincial power and their Lordships held that it was, notwithstanding, as was pointed out, the very wide language of the Dominion power.

'Excise' is defined in the Oxford Dictionary as primarily meaning a duty levied on the production or manufacture of goods produced within the country. If the concept of production and manufacture is already implicit in the quality of the tax, the position is made doubly clear by the repetition of the words "production and manufacture" in Item 45 and in the collocation it cannot mean anything other than a tax on production or manufacture. The question as to the nature of the tax is quite a different thing from the stage at which it may be imposed. A tax on production may be imposed at the stage of the production or as a matter of administrative convenience it may be imposed at a stage when it is issued out of a warehouse. But the time of its levy is not of the essence of the tax. What is important to see is whether it is a tax on production or on manufacture.

A question has been raised whether the tax can be levied at the stage of the first sale. The first answer to that question is, if the tax is levied at any stage at or beyond the stage of the first sale it is not a duty of excise. But it is unnecessary to go that length. It is sufficient to say that at the best it can be levied at the stage of the first sale. The decision of the High Court of Australia reported in *Commonwealth and Commonwealth Oil Refineries Ltd.* v. *South Australia,* 38 C.L.R. 408 which has been cited and relied on by the Government of India is really a case in favour of the Provinces. That case establishes two things. (1) In order that a tax may be a duty of excise it must be a tax on the producer or the manufacturer, in other words a tax on production or manufacture. Of course it is an indirect tax, therefore, there will be a tendency on the part of a producer or manufacturer to pass it on. But the fact that it is indirect is really irrelevant. (2) That a first sale may be so intimately connected with the producer and with the process of production and manufacture as virtually to amount to a tax on production. If we get so far it is clear that a retail sales tax can never be a duty of excise. It is not a proper method of argument to say "here is a case where a tax on the first sale has been held to be excise". Therefore a tax on the 2nd sale is an excise. So a tax on any sale up to the ultimate one is an excise. That syllogism has neither logic nor reason, to support it. Every one of the Judges in the Australian High Court lays stress on the fact that the sale in the particular case is a first sale and therefore might and would most probably be a sale by the producer or the manu-

facturer and that is the essence and the *ratio decidendi* of that decision. A tax on the retail sale can never be a duty of excise.

When there are two items in the lists, one a duty of excise, the other a tax on the sale of goods, the two items are to be read so as, if possible, not to overlap and so read there cannot be a duty of excise at the stage of the sale because at that point there would be an overlap. But even assuming that a duty of excise might be levied at the sale stage it cannot be levied at any stage beyond that first sale. When so levied it would be a sales tax pure and simple and not a duty of excise because the connection between the duty and the process of production is so remote.

What is to be the scope of Item 48 of the Provincial List. It is conceded by the Government of India that some scope must be afforded to the words in that item. To the repeated questions put by the Court as to what was the content of the expression taxes on the sale of goods in Item 48, as to what was granted to the Provinces under that item the Advocate-General of India was unable to give any reasonable answer. He first suggested some licence fees. It must obviously be incorrect. He then said that a turnover tax was what is meant. After all a turnover tax is only a species of sales tax and how it is that when a wider expression is used only the narrower meaning is conveyed is a little difficult to understand and he then went on to suggest qualifications even in regard to the turnover tax. He said it must be a tax on the slab system whereas the world over the percentage tax which is graduated according to articles is what prevails. Why he says that Parliament when it enacted the section had in contemplation a tax of an unknown kind, based on an unknown system, passes one's understanding. If the plain words of the section are given their normal and ordinary meaning there is really no difficulty. It is only when an artificial explanation of some truncated form of tax is suggested that difficulty is created.

The form which this item assumed at different stages in the White Paper, up to the stage of the Bill would throw light on the matter.

The Chief Justice, objected to the reference to the earlier proceedings as inadmissible.

Sir A. Krishnaswami Iyer—referred to 48 Supr. C. Repts at p 362 and 462 where Pope's Confederation Reports were held to be admissible for construing the British North America Act.

In order to construe the lists and the items a few cases from Canada were relied on. It is submitted that they are wholly irrelevant for the consideration of the question before the Court. The scheme of taxation in Canada is entirely different from the distribution of taxing, powers under the Government of India Act. The distinction between the Dominion and Provincial power in Canada is based on whether the tax in question is indirect or direct, a scheme which finds no place in our Act.

It is then said that the Central Provinces Act in so far as it relates to goods manufactured or produced in India levies a duty of excise which is contrary to Item 45 of the Federal List. If it stood there, the Central Provinces legislation would be good so far at least as it related to goods imported from abroad. But then it is said the Act in so far as it relates to them also is bad because it offends Section 297 as discriminating between foreign goods and Indian produced goods.

My contention on Section 297 is three-fold. One is as to the import of the expression "discrimination", namely, discriminatory intent. It is not enough that the particular act results in discrimination. There must be an intent to discriminate before there can be a discrimination under the section *Colonial Sugar Refining Co., Ltd.* v. *Irving*. 1906 A.C 360. The second is that the section posits the existence of the power or the capacity to discriminate. According to the Government of India there is no power at all in the Provincial Legislature in regard to one subject-matter, namely, in regard to goods which are not imported from abroad and the only power that inheres in the Legislature is the power to levy a duty in respect of goods imported from abroad. The whole foundation of Section 297 (1) (*b*) is that the Legislature has power to legislate over two matters and in regard to the mode of the exercise of that legislative power, provision is made against discrimination. Section 297 posits that the Provincial Legislature has power in both the fields. Then it makes provision as to how that power is to be exercised. If a power is taken to have been given in regard only to a particular subject, when the local legislature exercises the only power given to it, no question of discrimination can possibly arise.[1] A power to affect two sets of goods having been given as per the schedules to the Provincial Legislature Section 297 deals with the manner or the method in which that power could be exercised.

The third point is as to the word "locality." In the collocation of the words it refers only to a locality in India. I submit the locality is the locality in India and not outside India. *Vide* the marginal note to the section. The section is a restriction on legislative power and you will put a strict and literal construction on that.

In regard to the construction of Section 100 the general principle is that the two legislative lists are to be read together and the general words in the one list will have to be cut down so as to give effect to the words in the other list. This is conceded by the Advocate-General of India. It is therefore unnecessary to embark upon what exactly is the import of Section 100. That does not mean that one must hunt after dominance. The question of dominance of the federal legislative power by reason of the terms of Section 100 does not at all arise in this case.

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[1] *See* 57 Commonwealth Law Reports, 327 at p. 347 (Per *Latham*, *C. J.*) N.R.

The next point is as to the contention of the other side that multiplicity of taxation would be the result if the contention of the provinces were accepted. Multiplicity of taxation is inevitable. It cannot be avoided even in an unitary system. It becomes inevitable in a federal scheme. Further, that problem will arise, whether it is a turnover tax or whether it is a sales tax As pointed out by Clement (Canadian Constitution) when the power of taxation is committed to Sovereign legislatures, no question of abuse of power arises. Nor are the courts entitled to look at the possible effect on federal revenues. *Attorney General for Manitoba* v. *Manitoba License Holders Association*. 1902 A.C. 73 at p. 80.

The difference in the language of the devolution rules and the list dealing with excise would have to be borne in mind.

In the forefront you have an item (48) 'sales tax' in the Provincial List. That it may not be comprehended within the expression 'excise' is rendered clear by the fact that the latter expression is separately and independently used in the Provincial List. The lists themselves furnish the necessary glossary for the interpretation of the terms used. Light is welcome from any source, but the scheme of distribution of power in Canada and in Australia being entirely different from the Indian, the cases which have been rendered on the constitutions are not of much value. It is an unnecessary and futile task to embark upon an investigation of what are direct or indirect taxes. You have a specified item mentioned in the Provincial List. You must give some meaning to it and an attempt must be made to whittle it down.

In construing a constitution it is perfectly legitimate to look into the surrounding circumstances if you feel any difficulty in the interpretation of the lists. I do not want you to put a construction of the lists which they will not bear. If an item in the list is susceptible of a particular meaning and if you feel any doubt it is a perfectly legitimate manner of construction to consider the word in its proper context in the light of the surrounding circumstances.

There are enactments and enactments and the Privy Council have held that the principles which should govern the interpretation of a constitutional enactment need not be the same as that which would be adopted for construction of a municipal enactment. Applying those principles of construction I submit that you can come to no other conclusion than that the impugned provincial legislation is valid.

Sir B. L. Mitter, in reply:—The Government of India were not seeking to whittle down provincial powers under the Government of India Act. Their whole contention was that Section 3 of the C. P. Act did not impose a sales tax but imposed an excise duty. He wanted to dispel the alarm raised by the other side that if sources of taxation such as the one claimed for itself by the C. P. Government were denied to the provinces, they would be left high and dry There was a large field left open for the operation of provincial legislative powers.

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Included in this were all direct turnover taxes, a turnover tax at a slab rate on the sale of goods generally, a similar turnover tax at a flat rate; a turnover tax at a slab rate on the sale of specific goods and a similar tax at a flat rate.

A tax levied on an *ad valorem* basis on specific goods of home origin was excise and was Central taxation; but the field of sales tax was very wide.

Mr Justice Jayakar asked what specific goods were open for provincial taxation.

Sir B. L. Mitter replied that all foreign goods, provided discrimination did not enter, would be open to such provincial taxation.

Mr. Justice Jayakar:—Would you not claim it as customs?

Sir B. L. Mitter said he might not. The tax levied by the Central Provinces Government might be a sales tax within the meaning of entry 48 of the Provincial List, but it also came within the category of excise.

This was a case of overlap and the overlap portion belonged to the centre. Apart from this overlap portion, there was, he reiterated, a large field left for provincial powers of taxation to operate. If it was contended that a sales tax could be imposed on the top of an excise duty, then it would lead to curious results. Suppose, for instance, jute which was a commodity used all over India was taxed by Bengal, then it would mean that the Government of Bengal could tax consumers in other parts of India; this was repugnant to the whole scheme of the Act. The Central Provinces Government, had adopted a wrong form of taxation.

The opium legislation shows that excise duties were levied even at the stage of retail sales.

The decision in *Patten* v. *Brady* [184 N.S. 608] supports the contention of the Government of India—that a tax even at the stage of retail sale would be an excise.

Sir Alladi Krishnaswami Iyer referred to the scheme of American taxing powers and the wide import of the expression "excise" in American Law which was absolutely unrelated to anything under the Indian Constitution.

OPINION.

Gwyer, C.J.—This is a Special Reference which His Excellency the Governor-General has been pleased to make to the Court under S. 213 of the Constitution Act. The Reference is in the following terms:

> "Is the Central Provinces and Berar Sales of Motor Spirit and Lubricant's Taxation Act, 1938, or any of the provisions thereof, and in what particular or particulars, or to what extent, *ultra vires* the Legislature of the Central Provinces and Berar?"

The Court directed notice of the Reference to be given to the Government of India and the Provincial Government; and intimated that in view of their contingent interest in the matter, the other Provinces ought to be informed. This the Advocate-General of India undertook to do; and subse-

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quently leave was given to the Advocates-General of Bengal and Madras to appear and argue in support of the case of the Government of the Central Provinces and Berar, not on behalf of any particular Province but as representing the general provincial interest. The Court is much indebted to all the counsel engaged for the assistance which they have afforded it.

Notwithstanding the very wide terms in which the Special Reference is framed, the question to be determined lies essentially in a small compass. It has arisen in the following way. S. 3 (1) of the Provincial Act, to which it will be convenient to refer hereafter as the impugned Act, is in these terms:

S. 3 (1).—"There shall be levied and collected from every retail dealer a tax on the retail sales of motor spirit and lubricants at the rate of five per cent. on the value of such sales".

"Retail dealer" is defined by S. 2 as "any person who, on commission or otherwise, sells or keeps for sale motor spirit or lubricant for the purpose of consumption by the person by whom or on whose behalf it is or may be purchased"; and "retail sale" is given a corresponding meaning.

Both motor spirit and lubricants are manufactured or produced (though not to any great extent) in India. Motor spirit is subject to an excise duty imposed by the Motor Spirit (Duties) Act, 1917, an Act of the Central Legislature; no excise duty at present has been imposed on lubricants.

By S. 100 (1) of the Constitution Act, the Federal Legislature (which up to the date of the Federation contemplated by the Act means the present Indian Legislature) has, notwithstanding anything in sub-Ss. (2) and (3) of the same section, and a Provincial Legislature has not, power to make laws with respect to any of the matters enumerated in the Federal Legislative List, that is, List I in the Seventh Schedule to the Act. Entry (45) in that List is as follows:—"Duties of excise on tobacco and other goods manufactured or produced in India", with certain exceptions not here material; and it is said on behalf of the Government of India that the tax imposed by S. 3 (1) of the impugned Act, in so far as it may fall on motor spirit and lubricants of Indian origin, is a duty of excise within entry (45) and therefore an intrusion upon a field of taxation reserved by the Act exclusively for the Federal Legislature.

By S. 100 (3) of the Act, a Provincial Legislature has, subject to the two preceding sub-sections of that section, and the Federal Legislature has not, power to make laws for a Province or any part thereof with respect to any of the matters enumerated in the Provincial Legislative List, that is, List II of the Seventh Schedule. Entry (48) in this List is as follows:—"Taxes on the sale of goods and on advertisements"; and it is said on behalf of the Provincial Government that the tax imposed by the impugned Act is within the taxing power conferred by that entry, and therefore within the exclusive competence of the Provincial Legislature.

It will be observed that by S. 100 (1) the Federal Legislature is given the exclusive powers enumerated in the Federal Legislative List, "notwithstanding anything in the two next succeeding sub-sections" of that section. Sub-s. (2) is not relevant to the present case, but sub-S. (3) is, as I have stated, the enactment which gives to the Provincial Legislatures the exclusive

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powers enumerated in the Provincial Legislative List. Similarly Provincial Legislatures are given by S. 100 (3) the exclusive powers in the Provincial Legislative List "subject to the two preceding sub-sections", that is, sub-Ss. (1) and (2). Accordingly, the Government of India further contend that, even if the impugned Act were otherwise within the competence of the Provincial Legislature, it is nevertheless invalid, because the effect of the *non-obstante* clause in S. 100 (1), and *a fortiori* of that clause read with the opening words of S. 100 (3), is to make the federal power prevail if federal and provincial legislative powers overlap. The Provincial Government, on the other hand, deny that the two entries overlap and say that they are mutually exclusive. The Government of India raise a further point under S. 297 of the Constitution Act, but it will be more convenient to deal with this separately and at a later sage. I should add that it is common ground between the parties that if S. 3 (1) of the impugned Act is held to be invalid, the rest of the Act must be invalid also, since it only provides the machinery for giving practical effect to the charging section.

This is the first case of importance that has come before the Federal Court; and it is desirable, more particularly in view of some of the arguments addressed to us during the hearing, to refer briefly to certain principles which the Court will take for its guidance. It will adhere to canons of interpretation and construction which are now well-known and established. It will seek to ascertain the meaning and intention of Parliament from the language of the statute itself; but with the motives of Parliament it has no concern. It is not for the Court to express, or indeed to entertain, any opinion on the expediency of a particular piece of legislation, if it is satisfied that it was within the competence of the Legislature which enacted it; nor will it allow itself to be influenced by any considerations of policy, which lie wholly outside its sphere.

The Judicial Committee have observed that a Constitution is not to be construed in any narrow and pedantic sense[1]. The rules which apply to the interpretation of other statutes apply, it is true, equally to the interpretation of a constitutional enactment. But their application is of necessity conditioned by the subject-matter of the enactment itself; and I respectfully adopt the words of a learned Australian Judge:—"Although we are to interpret the words of the Constitution on the same principles of interpretation as we apply to any ordinary law, these very principles of interpretation compel us to take into account the nature and scope of the Act that we are interpreting,—to remember that it is a Constitution, a mechanism under which laws are to be made, and not a mere Act which declares what the law is to be".[2] Especially is this true of a federal constitution, with its nice balance of jurisdictions. I conceive that a broad and liberal spirit should inspire those whose duty it is to interpret it; but I do not imply by this that they are free to stretch or pervert the language of the enactment in the interests of any legal or constitutional theory, or even for the purpose of supplying omissions or

1. *Per* Lord Wright in *James* v. *Commonwealth of Australia,* (1936) A.C. 578 at p. 614.

2. *Att-Gen. for New South Wales* v. *Brewery Employees Union,* (1908) 6 Com. L.R. 469, per *Higgins, J.,* at p. 611.

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of correcting supposed errors. A Federal Court will not strengthen, but only derogate from, its position, if it seeks to do anything but declare the law; but it may rightly reflect that a Constitution of Government is a living and organic thing, which of all instruments has the greatest claim to be construed *ut res magis valeat quam pereat.*

Disputes with regard to central and provincial legislative spheres are inevitable under every federal Constitution, and have been the subject-matter of a long series of cases in Canada, Australia and the United States, as well as of numerous decisions on appeal by the Judicial Committee. Many of these cases were cited in the course of the argument. The decisions of Canadian and Australian Courts are not binding upon us, and still less those of the United States, but, where they are relevant, they will always be listened to in this Court with attention and respect, as the judgments of eminent men accustomed to expound and illumine the principles of a jurisprudence similar to our own; and if this Court is so fortunate as to find itself in agreement with them, it will deem its own opinion to be strengthened and confirmed. But there are few subjects on which the decisions of other Courts require to be treated with greater caution than that of federal and provincial powers, for in the last analysis the decision must depend upon the words of the Constitution which the Court is interpreting; and since no two Constitutions are in identical terms, it is extremely unsafe to assume that a decision on one of them can be applied without qualification to another. This may be so even where the words or expressions used are the same in both cases; for a word or a phrase, may take a colour from its context and bear different senses accordingly.

The attempt to avoid a final assignment of residuary powers by an exhaustive enumeration of legislative subjects has made the Indian Constitution Act unique among federal Constitutions in the length and detail of its Legislative Lists. Whether this elaboration will be productive of more or less litigation than in Canada, where there is also a distribution by enumeration, time alone will show, at least this Court will not be confronted with the additional problems created by the interlacing provisions of Ss. 91 and 92 of the British North America Act and the distribution of powers not only by the enumeration of specified subjects, but also by reference to the general or local nature of the subject-matter of legislation. But the interpretation of the British North America Act has given rise to questions analogous to that which is now before this Court, and there are two decisions of the Judicial Committee which lay down most clearly the principles which should be applied by Courts before which such questions may come.

In *Att.-Gen. for Ontario* v. *Att-Gen. for Canada*[3], the Committee observed that in the interpretation of the British North America Act, "if the text is explicit, the text is conclusive, alike for what it directs and what it forbids. When the text is ambiguous, as for example when the words establishing two mutually exclusive jurisdictions are wide enough to bring a particular power within either, recourse must be had to the context and scheme of the Act". In the earlier case of *Citizens Insurance Co.* v. *Parsons*[4],

3. (1912) A.C. 571 at p. 583.
4. (1887) 7 App. Cas. 96 at p. 108.

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the same principle had been more fully expounded. After pointing out that with regard to certain classes of Dominion (or Central) subjects, generally described in S. 91 of the British North America Act, legislative power may nevertheless reside as to some matters falling within that general description in the Legislatures of the Provinces, under S. 92, the Committee proceeded thus:

"In these cases it is the duty of the Courts, however difficult it may be, to ascertain in what degree, and to what extent, authority to deal with matters falling within these classes of subjects exists in each Legislature, and to define in the particular case before them the limits of their respective powers. It could not have been the intention that a conflict should exist; and in order to prevent such a result, the two sections must be read together and the language of one interpreted, and, where necessary, modified by that of the other. In this way it may, in most cases, be found possible to arrive at a reasonable and practical construction of the language of the sections, so as to reconcile the respective powers they contain, and to give effect to all of them. In performing this difficult duty it will be a wise course for those on whom it is thrown, to decide each case which arises as best they can, without entering more largely upon an interpretation of the statute than is necessary for a decision of the particular question in hand"

The question before the Court admits of three possible solutions: (1) that the provincial entry covers the tax now challenged and that the federal entry does not; (2) that the federal entry covers it, but that the provincial entry does not; and (3) that the tax falls within both entries, so that there is a real overlapping of jurisdiction between the two. In the first case, the validity of the tax could not be questioned; in the second, the tax would be invalid as the invasion of an exclusively federal sphere; in the third, it would, because falling within both spheres, be invalid by reason of the *non-obstante* clause. It is necessary therefore to scrutinize more closely the two entries, first separately and then in relation to each other and to the context and scheme of the Act.

The provincial legislative power extends to making laws with respect to taxes on the sale of goods. The words in which this power is given, taken by themselves and in their ordinary and natural sense, seem apt to cover such a tax as is imposed by the impugned Act; and it might indeed be difficult to find a more exact or appropriate formula for the purpose.

The federal legislative power extends to making laws with respect to duties of excise on goods manufactured or produced in India. "Excise" is stated in the Oxford Dictionary to have been originally "accise", a word derived through the Dutch from the late Latin *accensare,* to tax; the modern form, which ousted "accise" at an early date, being apparently due to a mistaken derivation from the Latin *excidere,* to cut out. It was at first a general word for a toll or tax, but since the 17th century it has acquired in the United Kingdom a particular, though not always precise, signification. The primary meaning of "excise duty" or "duty of excise" has come to be that of a tax on certain articles of luxury (such as spirits, beer or tobacco) produced or manufactured in the United Kingdom, and it is used in contradistinction to customs duties on articles imported into the country from elsewhere. At a later date the licence fees payable by persons who produced or sold excisable articles also became known as duties of excise; and the expression was still later extended to license fees imposed for revenue,

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administrative. or regulative purposes on persons engaged in a number of other trades or callings. Even the duty payable on payments for admission to places of entertainment in the United Kingdom is called a duty of excise: and, generally speaking, the expression is used to cover all duties and taxes which, together with customs duties, are collected and administered by the Commissioners of Customs and Excise. But its primary and fundamental meaning in English is still that of a tax on articles produced or manufactured in the taxing country and intended for home consumption. I am satisfied that that is also its primary and fundamental meaning in India; and no one has suggested that it has any other meaning in entry (45).

It was then contended on behalf of the Government of India that an excise duty is a duty which may be imposed upon home-produced goods at any stage from production to consumption; and that therefore the federal legislative power extended to imposing excise duties at any stage. This is to confuse two things, the nature of excise duties and the extent of the federal legislative power to impose them. Authorities were cited to us, from Blackstone onwards, to prove that excise duties may be imposed at any stage; and if this means no more than that instances are to be found where they have been so imposed, authority seems scarcely needed. It would perhaps not be easy without considerable research to ascertain how far Blackstone was justified at the time he wrote in saying that excise duties were an inland imposition, paid sometimes on the consumption of the commodity, and frequently on the retail sale. Blackstone's statement however is repeated, almost verbatim, in the latest edition of Stephen's Commentaries, and as a description of excise duties now in force in the United Kingdom it is demonstrably wrong; for a brief examination of those duties shows that in practically all cases it is the producer or manufacturer from whom the duty is collected. But there can be no reason in theory why an excise duty should not be imposed even on the retail sale of an article, if the taxing Act so provides. Subject always to the legislative competence of the taxing authority, a duty on home-produced goods will obviously be imposed at the stage which the authority find to be the most convenient and the most lucrative, wherever it may be; but that is a matter of the machinery of collection, and does not affect the essential nature of the tax. The ultimate incidence of an excise duty, a typical indirect tax, must always be on the consumer, who pays as he consumes or expends; and it continues to be an excise duty, that is, a duty on home-produced or home-manufactured goods, no matter at what stage it is collected. The definition of excise duties is therefore of little assistance in determining the extent of the legislative power to impose them; for the duty imposed by a restricted legislative power does not differ in essence from the duty imposed by an extended one.

It was argued on behalf of the Provincial Government that an excise duty was a tax on production or manufacture only and that it could not therefore be levied at any later stage. Whether or not there be any difference between a tax on production and a tax on the thing produced, this contention, no less than that of the Government of India, confuses the nature of the duty with the extent of the legislative power to impose it. Nor, for the reasons already given, is it possible to agree that in no circumstances

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could an excise duty be levied at a stage subsequent to production or manufacture.

If therefore a Legislature is given power to make laws "with respect to" duties of excise, it is a matter to be determined in each case whether on the true construction of the enactment conferring the power the power itself extends to imposing duties on home-produced or home-manufactured goods at any stage up to consumption, or whether it is restricted to imposing duties, let us say, at the stage of production or manufacture only. A grant of the power in general terms, standing by itself would no doubt be construed in the wider sense; but it may be qualified by other express provisions in the same enactment, by the implications of the context, and even by considerations arising out of what appears to be the general scheme of the Act.

The question must next be asked whether such a tax as is imposed by the impugned Act, though described as a tax on the sale of goods, could in any circumstances be held to be a duty of excise; for it is common ground that the Courts are entitled to look at the real substance of the Act imposing it, at what it does and not merely at what it says, in order to ascertain the true nature of the tax. Since writers on political economy are agreed that taxes on the sale of commodities are simply taxes on the commodities themselves, it is possible to regard a tax on the retail sale of motor spirit and lubricants as a tax on those commodities, and I will assume for the moment in favour of the Government of India that it is on that ground capable of being regarded as a duty of excise.

It appears then that the language in which the particular legislative powers which the Court is now considering have been granted to the Central and Provincial Legislatures respectively may be wide enough, if taken by itself and without reference to anything else in the Act, to cover in each case a tax of the kind which has been imposed, whether it be called an excise duty, if imposed by the Central Legislature, or a tax on the sale of goods, if imposed by a Province.

But the question before the Court is not how the two legislative powers are theoretically capable of being construed, but how they are to be construed here and now in the Constitution Act. This is a very different problem and one on which cases decided under other Constitutions can never be conclusive. In the United Kingdom there are no competing jurisdictions at all; and though in Canada, Australia and the United States there is a division or distribution of powers between the Centre and the Provinces or States, there is nowhere to be found set in opposition to one another the power of levying duties of excise and an express power of levying a tax on the sale of goods. In Canada there is, it is true, a double enumeration of legislative powers, but so far as taxation is concerned the conflict is between direct and indirect taxation, the first being the prerogative of the Provinces, the second of the Dominion; and though duties of excise (as well as those of customs) are mentioned in the British North America Act, it is nearly always as indirect taxes that constitutional questions arise with regard to them. In Australia all taxing powers belong to the States, except those which are specifically reserved to the Commonwealth. Among the latter are duties of customs and excise; and the question in Australia always is whether a particular tax

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falls within the field of taxation reserved to the Commonwealth or not; there can be no overlapping of particular legislative spheres. In the United States the Central Legislature has power to levy "taxes, duties, imposts and excises", provided that they are uniform throughout the States. This is not an exclusive power, and the States can levy what taxes they like (other than imposts or duties on imports or exports), subject to the provisions of the Constitution, though certain of those provisions, such as the commerce clause, operative in practice as a very effective restriction upon State powers. Only in the Indian Constitution Act can the particular problem arise which is now under consideration; and an endeavour must be made to solve it, as the Judicial Committee have said, by having recourse to the context and scheme of the Act, and a reconciliation attempted between two apparently conflicting jurisdictions by reading the two entries together and by interpreting, and, where necessary, modifying, the language of the one by that of the other. If indeed such a reconciliation should prove impossible, then, and only then, will the *non-obstante* clause operate and the federal power prevail; for the clause ought to be regarded as a last resource, a witness to the imperfections of human expression and the fallibility of legal draftsmanship.

It has been shown that if each legislative power is given its widest meaning, there is a common territory shared between them and an overlapping of jurisdictions is the inevitable result; and this can only be avoided if it is reasonably possible to adopt such an interpretation as would assign what would otherwise be common territory to one or the other. To do this it is necessary to construe the legislative power defined or described by one entry or the other in a more restricted sense than, as already pointed out, it can theoretically possess. I mention, only to dismiss, the argument that the new autonomy of the Provinces and the expenditure necessary to administer and maintain the vital services committed to their charge require that every intendment should be made in favour of the provincial taxing power. I should never deny the high importance of the provincial functions; but the Centre has also great responsibilities, though of another kind, and it is not for this Court to weigh one against the other. The issue must be decided on other grounds than these.

The provincial legislative power defined in entry (48) may be first considered. The Advocate-General of India, when asked what was left to the legislative power of the Provinces under this entry if the view of the Government of India prevailed, said that it was clearly within their power to levy the taxes commonly known as turnover taxes, which under that name or under the name of sales taxes have since the War proved so successful a fiscal expedient in many countries. Strictly, a turnover tax appears to be the correct description of a tax, usually calculated in the form of a percentage, on the gross receipts of wholesalers or of retailers or of both, and in some countries also on receipts in respect of services. It is however sometimes included under the more general name of sales tax, and it is evident from the various modern writers who have dealt with the subject and to whose works we were referred[5] that the latter expression is often used as a

5. Findlay Shirras, Science of Public Finance (3rd Ed., 1936), Vol. II, Ch. 25; Comstock, Taxation in the Modern State, ch. 8.

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convenient name for a number of taxes ranging from turnover taxes to taxes on the retail sale of specified classes of goods; the so-called sales taxes which have been imposed by a large number of the State Legislatures in the United States seem to be often of the latter variety[6]. Two citations from these writers will be sufficient to show that neither "turnover tax" nor "sales tax" has yet achieved a recognized and certain meaning:

> "The scope of sales and turnover taxes has varied greatly. Some extended to all transactions, both wholesale and retail, and others to wholesale transactions only. The first of these are usually called turnover taxes. Certain taxes include both goods and services, while others include only goods The German turnover tax is an example of a tax which includes nearly every type of transaction in the line of goods and services."[7]

And again:—

> "The tax (*i e.,* the sales or turnover tax) may be general, as in France or Germany, or retail transactions may be excluded, as in Belgium It may be, as is common in the States of the American Union, confined to retail transactions It may be imposed, as in Canada and Australia, as a producers' or manufacturers' tax, and it may be on classified industries or trades only. It may be levied on nearly all goods and services, as in Germany. It may exempt certain sales, as in France, where the sales of farmers are exempted unless carrying on manufacture as well as agriculture "[8]

Thus the expression "sales tax" may comprehend a good deal more than would be understood by "tax on the sale of goods" in the ordinary and natural meaning of those words; and the expression "turnover tax" seems to be in some directions wider and in others narrower. "Tax on the sale of goods" at any rate seems to include some varieties of turnover tax, but it seems also to include more than a turnover tax in the stricter sense could reasonably be held to cover. In these circumstances it may be thought hazardous to impute to Parliament any particular intentions with regard to turnover taxes. Parliament may have had them in mind. The Proposals for Indian Constitutional Reform, commonly known as the White Paper (Cmd. 4268, 1933), and the report of the Joint Select Committee thereon (H.L. 6 and H.C. 5, 1934) are historical facts, and their relation to the Constitution Act is a matter of common knowledge, to which this Court is entitled to refer; and it may be observed that "taxes on the sale of commodities and on turnover" appeared in the White Paper as a suggestion for possible sources of provincial revenue, and that the suggestion was approved without comment by the Joint Select Committee. I do not know, and it would be idle to speculate, why a different formula was ultimately inserted in the Act; the Court is only concerned with what Parliament has in fact said; and if the Government of India are right and "taxes on the sale of goods" was intended to refer to taxes on turnover alone, I find it difficult to understand why Parliament used so inappropriate and indeed misleading a formula. "Taxes on turnover" may not be yet a term of art, but some of its meanings are tolerably plain. "Taxes on the sale of goods" appears to me to be plainer still; and though there may be general agreement that it includes some forms of turnover tax, it seems to me a straining of language to say that it can only mean a turnover tax to the exclusion of everything else. Certainly

6 H. L. Lutz, Public Finance (3rd Ed., 1936), ch. 26.

7. Comstock, *ibid.,* p. 113.

8. Findlay Shirras, *ibid.,* p. 610.

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that would not be its ordinary meaning; and I cannot persuade myself, even for the purpose of avoiding a conflict between the two entries, that Parliament deliberately used words which cloaked its real intention when it would have been so simple a matter to make that intention clear beyond any possibility of doubt. I therefore proceed to inquire if it is reasonably possible to avoid the conflict by construing the power to make laws "with respect to" duties of excise as not extending to the imposition of a tax or duty on the retail sale of goods. This is the crucial issue in the case.

In my opinion the power to make laws with respect to duties of excise given by the Constitution Act to the Federal Legislature is to be construed as a power to impose duties of excise upon the manufacturer or producer of the excisable articles, or at least at the stage of, or in connexion with, manufacture or production, and that it extends no further. I think that this is an interpretation reasonable in itself, more consonant than any other with the context and general scheme of the Act, and supported by other considerations to which I shall refer.

I have said that it seems to me impossible, without straining the language of the Act, to construe a power to impose taxes on the sale of goods as a power to impose only turnover taxes. To construe the power to impose duties of excise as I think it ought to be construed, involves no straining of language at all. The expression "duties of excise", taken by itself, conveys no suggestion with regard to the time or place of their collection. Only the context in which the expression is used can tell us whether any reference to the time or manner of collection is to be implied. It is not denied that laws are to be found which impose duties of excise at stages subsequent to manufacture or production; but, so far as I am aware, in none of the cases in which any question with regard to such a law has arisen was it necessary to consider the existence of a competing legislative power, such as appears in entry (48).

Much stress was laid upon two cases which were cited to us. In *Patton* v. *Brady*[9] a case before the United States Supreme Court, tobacco, which had already paid excise duty, had been sold to the plaintiff. While it was still in his hands, an Act was passed doubling the current rate of duty and (no doubt lest persons in possession at the moment of duty-paid tobacco should get an unearned increment on its sale) imposing a special duty on all tobacco which had paid the excise duty in force at the date of the Act and was at that date held and intended for sale. The Act was challenged as unconstitutional on the ground (*inter alia*) that the Legislature having once excised an article could not excise it a second time. The Court, upholding the Act on this particular point, referred to the account of excise duties given in Blackstone and Story and to definitions in various standard dictionaries, and then said:

"Within the scope of the various definitions we have quoted, there can be no doubt that the power to excise continues while the consumable articles are in the hands of the manufacturer or any intermediate dealer, and until they reach the consumer. Our conclusion then is that it is within the power of Congress to increase an excise, as well as a property tax, and that such an increase may be made at least

9. (1901) 184 U.S. 608.

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while the property is held for sale and before it has passed into the hands of the consumer."[10]

The case is thus a decision on the scope and extent of the power to impose excise duties given to the Central Legislature by the Constitution of the United States. No question was involved of a competing legislative power. It is to be observed however that the imposition of an excise duty at a stage later than production or manufacture was obviously regarded as an unusual thing and that the duty about which the litigation arose was not intended as a permanent duty but was imposed once for all. The other case was *Commonwealth Oil Refineries Co.* v. *South Australia.*[11] There a State law had (*inter alia*) purported to impose an additional income-tax (for so the duty was described) at the rate of 3*d.* for every gallon of motor spirit sold by any person who sold and delivered it within the State to persons within the State for the first time after its production or manufacture, but not including any purchaser who subsequently sold it. It was argued that this was in substance a duty of excise which under the Constitution only the Commonwealth had the right to impose, and that contention prevailed. It might at first sight appear that this decision supported the Government of India's case; for, as already pointed out, the taxing power of the Australian States is unlimited, save in so far as the Constitution reserves the right of imposing certain specified taxes to the Commonwealth and indirectly limits the power of the States by giving the Commonwealth power to regulate inter-State trade and commerce. But a closer examination of the judgments delivered shows that the majority of the Judges took the view that the duty on the first sale of the commodity was in fact a tax on the producer and for that reason a duty of excise without doubt. The case is no authority at all for the proposition that a tax on retail sales must necessarily be a duty of excise.

It cannot be too strongly emphasised that the question now before the Court is one of possible limitations on a legislative power, and not possible limitations on the meaning of the expression "duties of excise"; for "duties of excise" will bear the same meaning whether the power of the Central Legislature to impose them is restricted or extended. It is a fundamental assumption that the legislative powers of the Centre and Provinces could not have been intended to be in conflict with one another, and therefore we must read them together and interpret or modify the language in which one is expressed by the language of the other. Here are two separate enactments, each in one aspect conferring the power to impose a tax upon goods; and it would accord with sound principles of construction to take the more general power, that which extends to the whole of India, as subject to an exception created by the particular power, that which extends to the Province only. It is not perhaps strictly accurate to speak of the provincial power as being excepted out of the federal power, for the two are independent of one another and exist side by side. But the underlying principle in the two cases must be the same, that a general power ought not to be so construed as to make a nullity of a particular power conferred by the same

10 *Ibid*, at p. 623.
11. 38 Com.L.R. 408.

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Act and operating in the same field, when by reading the former in a more restricted sense effect can be given to the latter in its ordinary and natural meaning. So in *Bank of Toronto* v. *Lambe*[12] where a provincial Legislature in Canada had imposed a tax upon banks carrying on business in the Province, varying in amount with the paid up capital and with the number of the offices of the bank, whether or not the bank's principal place of business was within the Province, it was argued that even if the tax imposed by the Act was direct taxation and therefore within the power of the provincial Legislature under S. 92 of the British North America Act, it was nevertheless invalid because it was legislation relating to banking and the incorporation of banks, the making of laws on which was by S. 91 of the Act vested solely in the Dominion Parliament The Judicial Committee rejected this argument. They pointed out that in the case of *Citizens Insurance Company* v. *Parsons*,[13] to which reference has already been made, it was found absolutely necessary that the literal meaning of the words defining the powers vested in the Dominion Parliament should sometimes be restricted, "in order to afford scope for powers which are given exclusively to the provincial Legislatures"; and they summed up the matter thus:

> "The question they [the Committee] have to answer is whether the one body or the other has power to make a given law. If they find that on the due construction of the Act the Legislative power falls within S. 92, it would be quite wrong of them to deny its existence because by some possibility it may be abused, or may limit the range which would otherwise be open to the Dominion Parliament."

This is not to ignore the *non-obstante* clause, still less to bring into existence, as it were, a *non-obstante* clause in favour of the Provinces; for if the two legislative powers are read together in the manner suggested above, there will be a separation into two mutually exclusive spheres, and there will be no overlapping between them. Thus the Central Legislature will have the power to impose duties on excisable articles before they become part of the general stock of the Province, that is to say, at the stage of manufacture or production, and the Provincial Legislature an exclusive power to impose a tax on sales thereafter.

In discussing the possible overlapping of the federal and provincial jurisdictions, I assumed for the moment that a tax on retail sales might be a duty of excise. Whether it is so or not must depend upon circumstances; certainly I cannot agree that it must always be so regarded, even where the power to impose duties of excise extends to imposing them at stages subsequent to production or manufacture. There are some significant observations on this point in the judgment of Isaacs, J. (afterwards Isaacs, C.J.) in the *Commonwealth Refineries Case,* to which reference has already been made. After stating his conclusion that the words "excise duties" were not used in the Constitution in the extended sense which had been suggested, the learned Judge proceeded as follows:

> "I arrive at that conclusion notwithstanding the expression was in South Australia before Federation, as in Victoria, sometimes used in a sense large enough to include brewers' and wine licences. Licences to sell liquor or other articles may well come within an excise duty law, if they are so connected with the production of the article

12. (1887) 12 A.C. 575 at 577, 587.

13. 7 App. Cas. 96.

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sold or are otherwise so imposed as in effect to be a method of taxing the production of the article. But if in fact unconnected with production and imposed merely with respect to the sale of goods as existing articles of trade and commerce, independently of the fact of their local production, a licence or tax on the sale appears to me to fall into a classification of governmental power outside the true content of the words "excise duties" as used in the Constitution.......Therefore, if the taxation by the State Act under S. 4 were simply on motor spirit as an existing substance in South Australia and not subject to any foreign or inter-State operation of trade or commerce, it would not be open to the challenge here made "[14]

There appears to be a sound basis for the above distinction and the case which the Court is now considering is indeed stronger than the Australian one, for in the latter the power of the State to levy taxes on sale other than duties of excise was implied in its general powers of taxation and was not conferred expressly as in entry (48). No doubt there will be borderline cases, in which it may be difficult to say on which side a particular tax or duty falls; but that is one of the inevitable consequences of a division of legislative powers. If however the facts in *Patton* v. *Brady* had been such as to make the decision turn upon the distinction between the two kinds of tax mentioned above, it seems probable that the special duty there imposed would still have been held to be a duty of excise, because it was an attempt, as it were, to relate the duty back to the stage of production, even though the person made liable for payment was not (and indeed could seldom have been) the original producer himself. In the present case it could not be suggested that the tax on retail sales has any connection with production; it is also imposed indifferently on all motor spirit and lubricants, whether produced or manufactured in India or not. I do not say that this is conclusive, but it is to be taken into consideration And I think that the distinction drawn by the learned Judge corresponds in substance with the distinction which it seems to me ought to be drawn in the case of the federal and provincial spheres in India, that is, between the taxation of goods at the stage of manufacture or production and their taxation by the provincial taxing authority (as in Australia by the State) after they have become part of what I have called the common stock of the Province. The learned Judge's observations, it is true, were *obiter*, and in any case are not binding upon us; but I am strengthened in my own view by what he has said.

I am impressed also by another argument. The claim of the Government of India must be that any provincial Act imposing a tax on the sale of any goods (other than a turnover tax) is an invasion of entry (45) in the Federal Legislative List, whether the goods are at the time the subject of a central excise or not, and no matter how improbable it is that any excise will ever be imposed upon them. Duties of excise in the nature of things will always be confined to a comparatively small number of articles; but it is a necessary corollary of the argument of the Government of India that the power to impose excise duties, though only exercised with respect to this small group, is an absolute bar to the exercise by the Provinces of any jurisdiction by way of a tax on sales over every other material, commodity and article manufactured or produced in India and to be found in the Pro-

14. 38 Com.L.R. 408 at 426.

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vince. Nay, more; for though excise duties can only be imposed in respect of goods manufactured or produced in India, it is part of the Government of India's case that to impose a tax on the sale of goods manufactured or produced elsewhere will infringe the provisions of S. 297 (1) (*b*) of the Constitution Act against discrimination. It is not necessary for me here to say whether I agree with the latter argument or not; it is sufficient to point out how on one ground or the other this interpretation of the federal entry would exclude the Province from an immense field of taxation in which the Government of India does not now and probably would never in the future seek to compete. I should find it exceedingly difficult to adopt an interpretation of the two entries which would have consequences such as these.

Lastly, I am entitled to look at the manner in which Indian Legislation preceding the Constitution Act had been accustomed to provide for the collection of excise duties, for Parliament must surely be presumed to have had Indian legislative practice in mind and, unless the context otherwise clearly requires, not to have conferred a legislative power intended to be interpreted in a sense not understood by those to whom the Act was to apply. There were several central excise duties in force in India at the date of the passing of the Constitution Act, imposed respectively upon motor spirit, kerosene, silver, sugar, matches, mechanical lighters, and iron and steel. In all the Acts[15] by which these duties were imposed it is provided (and substantially by the same words) that the duty is to be paid by the manufacturer or producer, and on the issue of the excisable article from the place of manufacture or production. The Acts which imposed the cotton excise, now repealed, were in the same form.[16]

The only provincial excise duty in force was that on alcoholic liquor and intoxicating drugs. The Devolution Rules, 1920, which were made under S 45-A of the then Government of India Act, "for the purpose of distinguishing the functions of the local Governments and local legislatures of Governors' Provinces," classified a variety of subjects, in relation to the functions of government, as central and provincial subjects respectively. Among the provincial subjects appears the following:

"16. Excise, that is to say, the control of production, manufacture, possession, transport, purchase, and sale of alcoholic liquor and intoxicating drugs, and the levying of excise duties and licence fees on or in relation to such articles......".

The earlier part of this entry obviously describes an administrative and legislative sphere only, the taxing power being given in the last words quoted, which I take to mean excise duties on the articles mentioned and licence fees in relation to them. But here again, after examining various

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15. Motor Spirit (Duties) Act (No. II of 1917), extended to kerosene by Indian Finance Act (No. XII of 1922); Silver Excise Duty Act (No. XVIII of 1930); Sugar (Excise Duty) Act (No. XIV of 1934); Matches (Excise Duty) Act (No. XVI of 1934); Mechanical Lighters (Excise Duty) Act (No. XXIII of 1934); Iron and Steel Duties Act (No. XXXI of 1934).

16. Cotton Duties Act (No. XVII of 1894); Cotton Duties Act (No. II of 1896).

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provincial Acts relating to the control of alcohol, I have been unable to find any case of excise duties payable otherwise than by the producers or manufacturers or persons corresponding to them; I am speaking of course only of alcohol manufactured or produced in the Province itself. The Advocate-General of India referred us to an Act of the Central Provinces (Central Provinces Excise Act No. II of 1915) which was said to make provision for the imposition of an excise duty on retail sales. I have been unable to find any such provision in the Act, it provides, it is true, as do other provincial Acts, for lump sum payments in certain cases by manufacturers and retailers, which may be described as payments either for the privilege of selling alcohol, or as consideration for the temporary grant of a monopoly; but these are clearly not excise duties or anything like them. Provision was also made in most provincial Acts for the payment of licence fees in connection with the production or sale of alcohol in the Province; but these fees are mentioned in the Devolution Rules entry in addition to excise duties and are therefore something different from them.

Thus at the date of the Constitution Act, though it seems that the word "excise" was not infrequently used as a general label for the system of internal indirect taxation or for the administration of a particular indirect tax (as salt excise or opium excise), the only kind of excise *duties* which were known in India by that name were duties collected from manufacturers or producers, and usually payable on the issue of the excisable articles from the place of manufacture or production. This also may not be conclusive in itself, but it seems a not unreasonable inference that Parliament intended the expression "duties of excise" in the Constitution Act to be understood in the sense in which up to that time it had always in fact been used in India, where indeed excise duties of any other kind were unknown. Nor indeed are excise duties properly so called often to be found at the present day which are not collected at the stage of production or manufacture, whatever may have been the case in Blackstone's time, and whatever may have been the reasons for Johnson's definition of Excise in the first edition of his dictionary (1755) as "a hateful tax levied on commodities and adjudged not by the common Judges of property but wretches hired by those to whom the excise is paid." *Patton* v. *Brady* was obviously a very special case. The United Kingdom Finance Act, 1922, S. 9, to which we were referred, seems to me to impose a duty more properly classified as a privilege tax on clubs than as an excise duty in the ordinary sense, though I agree that it is called by the latter name; and in any case it is the only example of its kind which the industry of counsel was able to produce Most of the dictionary definitions of the word "excise" seem to derive ultimately from Blackstone; and it has been seen how wholly incorrect Blackstone's description, as reproduced in Stephen's Commentaries, has now become. The Oxford Dictionary has a definition which purports to be a quotation from the Encyclopaedia Britannica (though apparently not from the title "Excise" in the latest edition of the Encyclopaedia): "A duty charged on home goods, either in process of their manufacture or before their sale to the home consumers". In this definition the words "before their sale to the home consumers" do not seem

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to be necessarily a reference to retail sales; they might be equally a reference to a sale by the producer or manufacturer to the wholesaler for general distribution to consumers

The conclusion at which I have arrived seems to me to be in harmony with what I conceive to be the general scheme of the Act and its method of differentiation between the functions and powers of the Centre and of the Provinces It introduces no novel principle. It reconciles the conflict between the two entries without doing violence to the language of either, and it maps out their respective territories on a reasonable and logical basis. It would be strange indeed if the Central Government had the exclusive power to tax retail sales, even if the tax were confined to goods produced or manufactured in India, when the Province has an exclusive power to make laws with respect to trade and commerce, and with respect to the production, supply and distribution of goods. within the provincial boundaries. In the view which I take none of these inconsistencies will arise. Nor will the effect of this interpretation be to deprive the Centre of any source of revenue which it enjoys at present, nor of any which it is reasonable to anticipate that it might have enjoyed in the future. If I may be permitted to hazard a guess, the anxiety of the Government of India arises from the probability that a general adoption by Provinces of this method of taxation will tend to reduce the consumption of the taxed commodities and thus indirectly diminish the Central excise revenue. This, however, is a circumstance which this Court cannot allow to weigh with it if, as I believe, the interpretation of the Act is clear; though it might be an element to take into consideration if there were real ambiguity or doubt. But I do not think there is either ambiguity or doubt, if the two entries are read together and interpreted in the light of one another. The difficulty with which the Government of India may be faced is of a kind which must inevitably arise from time to time in the working of a Federal Constitution, where a number of taxing authorities compete for the privilege of taxing the same tax-payer. In the present case, the result may well be that the Central Government will find itself unable to make such a distribution of the proceeds of excise duties under S. 140 of the Act as it might otherwise desire to do; but these are not matters for this Court, and they must be left for adjustment by the interests concerned in a spirit of reasonableness and commonsense, qualities which I do not doubt are to be found in India as in other Federations.

The view which I have taken makes it unnecessary for me to consider the difficult question of the interpretation of S. 297 (i) (*b*), and I express no opinion upon it.

I am of opinion that for the reasons which I have given the answer to the question referred to us is that the Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938, is not *ultra vires* the Legislature of the Central Provinces and Berar, and since that is also the opinion of the whole Court we shall report to His Excellency accordingly.

There will be no order as to costs.

Sulaiman, J.—I concur in the final conclusion of the Chief Justice, though partly on different grounds The question referred to us is whether the Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938, or any of the provisions thereof, and in what particular or particulars or to what extent is *ultra vires* of the Legislature of the Central Provinces and Berar. The Act is a short one, and the Advocate-General of India has expressly confined his objection to the provisions of S. 3 (1) under which a tax is levied and collected from every retail dealer on the retail sales of motor spirit and lubricants at the rate of 5 per cent. on the value.

In the Seventh Schedule of the Government of India Act, 1935, the various heads are classified in an elaborate manner, and with respect to them the legislative powers between the Federation and the Provinces are carefully distributed. It contains two exclusive lists and one concurrent list List I of the Schedule is the Federal Legislative List, comprising matters exclusively assigned to the Federation and entry No. 45 therein is "Duties of excise on tobacco and other goods manufactured or produced in India", with three exceptions with which we are not concerned. List II, which is the Provincial Legislative List, contains entry No. 48 "Taxes on the sale of goods" and on advertisements.

The validity of the impugned Act therefore depends on the meanings to be given to these two competing entries, and on the question whether they are mutually exclusive or overlap. If the meaning of the words used in No 45 includes taxes on retail sales, then the power of the Central Legislature to make laws with respect to the latter would follow as a matter of course. In such an inevitable overlap the Provinces must give way. The meaning of the latter expression 'taxes on the sale of goods' is perfectly plain; the ambiguity, if any, lies in the interpretation of the words "duties of excise" which have not been defined in the Act.

Economists' definition of "excise" cannot be conclusive. But there are even some economists who think that an excise duty does not include sales to consumers. Findlay Shirras in his Science of Public Finance, Vol. II (3rd edition), p. 652, has defined "excise" as ordinarily meaning:

"A tax or duty on home-produced goods, either in the process of their manufacture or *before their sale to consumers*, especially on spirits, beverages, gasoline, sugar, and tobacco. It includes also certain licences, commodities, and licences to conduct certain trades. It is usual to *exclude* from excise or excises *sales or turnover taxes*."

At p. 653 he has again remarked:

"It is, in short, the general rule to *exclude sales or turnover taxes from excises*."

In the Encyclopædia of the Social Sciences by Seligman and Johnson, Vol. V, p. 669 "excise" is defined as:

"A tax on commodities of domestic manufacture levied either at some stage of production or *before the sale to home consumers*".

At p. 670 it is remarked:

"The excise tax may be levied on the raw material or the finished article or it may attach to an intermediate stage of the production process."

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Even in Economics, there is a clear distinction between customs and excise duties on the one hand, and retail sales tax on the other, the latter being levied upon the sale of tangible personal property at retail.

The Economists' distinction between direct and indirect taxation as a test of a duty being excise duty or not cannot be accepted in full. An excise duty is certainly an indirect tax, but the converse is not true. Every indirect inland tax is not necessarily an excise duty. A Statute of Parliament is not a thesis on Economics; and the question is really one of law and not of Economics. As remarked by Lord Hobhouse:

"Economists seek to trace the effect of taxation throughout the community. But the question is a legal one." (*Bank of Toronto* v. *Lambe*[17].)

"The excellence of an economists" definition will be measured by the accuracy with which it contemplates and embraces every incident of the thing defined. But that very excellence impairs its value for the purposes of the lawyer." (*Ibid.*, p. 582). The modern definitions in Economics of direct and indirect taxations cannot now be accepted. To rely on the definitions of political economists was "inconsistent with the decisions of this Board going back to the year 1878". (*Per* Lord Thankerton in *Kingcome Navigation Co , Ltd* [18]).

The meaning of "excise" as given in *English Dictionaries* is, of course, very comprehensive, as the writer of a Dictionary has to include all possible uses to which the word is put But in common parlance the duty of excise is more or less connected with home manufacture or production, even though its collection may be delayed till a later stage.

The Government of India Act was drafted after the deliberations of the Round Table Conference were over and the Joint Committee had resurveyed the field, and the drafting was done in England by British draftsmen who again revised and recast the Lists; and it was then passed by the Imperial Parliament. The *English sense* of the word "excise" must therefore be examined first.

Stephen in his Commentary (Vol. II, Ch. VII) following Blackstone's old definition (Commentary, Vol. I, Ch. VIII) has stated:—

"Excise duties are those duties which are imposed by Parliament upon commodities produced and consumed in this country. They are directly opposite in their nature to the Customs duties, for they are an inland imposition, paid sometimes on the consumption of the commodities, frequently upon the retail sale."

This was apparently based on the fact that about the middle of the 17th century there were excise duties laid on the makers and vendors of ale, etc. It does not however appear that their Lordships of the Privy Council have in any Dominion case adopted Blackstone's definition of "excise".

In the Encyclopaedia Britannica, Vol. VIII, p. 955 (14th Ed.,) it is pointed out that "in modern times, however, the term generally connotes a tax on articles of home manufacture in contradistinction to customs duties which are levied on certain articles imported". Thus the term has assumed

17. (1887) 12 A.C 5 75 at p 581.

18. (1934) A C. 45 at 51.

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a more restricted meaning since Stephen's adoption of Blackstone's definition.

In Halsbury's Laws of England (Hailsham Edition), Vol. 28, p. 330, Note (*a*), the Dictionary meaning has been adopted and excise duties taken to be "duties payable on goods produced at home, whereas customs duties are duties on goods imported into this country from abroad. ..Excise duties now, however, comprehend other duties, such as entertainments duty, etc." Thus in England they have a fairly wide range. Even a dog tax, a vehicle tax, a hawker's license tax tax for wine licenses and pawn broker's licenses have been recognised in England to come within the range of excise duties, although in their nature they are licenses. Again, in England excise duty is levied on the amount of the purchases of intoxicating liquor supplied in or to a club or on behalf of a club to its members, (*Ibid,* 28, para. 639). A duty of excise is payable on all payments for admission to any place of entertainment. (*Ibid.,* para. 681.) Indeed, all dues realised through the Commissioners of Customs and Excise are treated either as customs or excise duties.

There is a historical reason for the broad distinction in England between Customs and Excise. The system of excise duties was borrowed from the Low Countries and initially placed under the control of a Board of Commissioners, though later the excise revenue was for some time farmed out. When the excise duties were introduced into England by the Long Parliament in 1643 they were then laid on the makers and vendors, of ale, beer, cider and perry. (Wartons' Law Lexicon, 13th edition, pp. 334-5). Half the excise revenue was permanently allotted to Charles I and his heirs till ultimately the whole of it was transferred to the State. On this account Customs and Excise duties developed into two distinct categories. As in England the Imperial Parliament is supreme and there has been no rival autonomous Government, no occasion really arose for any possible conflict between legislative powers; nor could any question arise as to the niceties of distinction between direct and indirect taxation. As against excise duties the sharp contrast was furnished by customs duties, which include export and import duties, affecting goods sent out abroad or brought in from abroad. As customs duties were imposed on the entry of foreign goods and excise duties were an inland imposition, they could not as regards the stages of levy be coextensive. It is no wonder therefore that the term "excise" is freely used in England in a very general and comprehensive sense, and for convenience includes even collection of revenue on goods manufactured, produced or sold in the country, that is to say on home products and home consumption, as well as certain licenses.

There are several reasons why the wider English meaning may be inapplicable to the Indian Constitution. (1) There are no historical reasons for applying excise duty to all inland impositions in contrast with customs only. (2) Unlike England, where there can be no conflict of legislative powers, the Indian Constitution is a federal one, and the Federation need not necessarily as against the Provinces have power to impose duties up to the stage of consumption. (3) In the Indian Act, the Federal and the

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Provincial Legislative lists are separate and have to be read together and reconciled as far as possible. (4) The power to impose taxes on the sale of goods has been assigned exclusively to the Provinces, and the excise duties assigned to the Federation may not presumably include it. (5) In the Indian Act, the word used is not merely "excise" but "duties of excise on goods manufactured or produced in India", which may exclude licences, contrary to the English practice of including within excise everything that is collected by Excise Commissioners. (6) The words also show that the duty is connected with manufacture or production. (7) In the Provincial List, to give only one instance, there is a special head No 50 which includes tax on entertainments, and would therefore, contrary to the English usage, not come within excise. (8) Even the Dominions, because of their Federal Constitutions, have found it impossible to adopt the word excise in its widest possible English sense. (9) The Devolution Rules, framed under the Government of India Act, 1919, were in force at the time the new Act was passed, and the present lists are to some extent based on the previous lists. It cannot therefore be presumed that the word "excise" used in the Government of India Act has necessarily the wider meaning which it has in England.

Story adopted Blackstone's definition in his Constitution of the United States. But the analogy of that old Constitution (1787) cannot be a good guide when considering a recent Act. Under S. 1.(3) direct taxes have to be apportioned among the States, and under S. 8, the Congress possesses wide powers, though not exclusive, of laying and collecting uniform "taxes, duties, imposts and excises". The word "excise" has apparently been interpreted by the Courts in the United States to have the same wide significance as in England. It includes several things which may not in a narrower sense be regarded as excise, (*See* Cooley: Principles of Constitutional Law in U S.A., Ch. VI)

This view finds support from the case of *Patton* v. *Brady*.[19] In that case Patton had in May 1898 purchased a large quantity of manufactured tobacco in the open market on which the existing excise duties had been duly paid when it was removed from the factory. Patton was not himself the consumer, but held the tobacco for sale In June 1898 a new Act was approved by the Congress under which an additional tax upon all tobacco and snuff was imposed, and there was also a retrospective provision assessing a reduced tax on tobacco, among other articles, which was "manufactured, imported and removed from factory or customs house" subsequent to 14th April, 1898. Patton claimed a refund of the duty levied and collected from him on his tobacco under the last provision. In argument it was practically conceded by one counsel that it was an excise tax, but they all "specifically insisted that the power of imposing an excise once exercised is gone". Brewer, J., held (Harlan and Gray, JJ., not taking part in the decision) that the tax was not a direct tax but an excise duty; and also that an additional tax was not illegal. This conclusion was, of course, obvious. The general tendency of the duty was to be passed on to the consumer, and it could not

19. (1901) U.S.S.R. 607.

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possibly be regarded as direct taxation. Further, the duty was on tobacco manufactured (or imported) *and* removed from factory (or customs house). It was intended to be one tax in relation to both manufacture and removal, and not two taxes in relation to manufacture and removal separately. It was in reality a tax on the manufacture and removal of tobacco, and was assessed at a subsequent stage, simply because it had not been paid previously at the time of the removal from the factory The observations of the learned Judge, however, went a little further. He quoted with approval the definition of excise as laid down by Blackstone and Stephen, and also as given in two standard dictionaries that it

> "applied to internal, or inland impositions, levied sometimes upon the consumption of a commodity, sometimes upon the retail sale of it and sometimes upon the manufacture of it",

and remarked that

> "the power to excise continues while the consumable articles are in the hands of the manufacturer or any intermediate dealer and until they reach the consumer".

As taxes on sales of goods are not specifically assigned to the States, the *obiter dictum* of the learned single Judge may possibly be justified in America, but it is not for me to express any opinion on this. It may, however, be pointed out that "to-day more than 30 States are using some kind of sales tax" (H.L. Lutz: Public Finance, pp. 631-2). In one year 1933 alone some sixteen States enacted sales taxes. "Nearly all of the taxes adopted in 1933 are retail sales taxes. . . . . Customarily the vendor rather than the vendee is liable for taxation, although both may be held responsible for proper payment of the tax". (Seligman and Johnson, Encyclopædia of the Social Sciences, Vol. XIII, p. 517.)

The British North America Act, 1867, embodying the Canadian Constitution was based on the Quebec resolutions and was of Canadian origin, particularly as Canadian delegates had a hand in the actual drafting of the Bill; and so the word 'excise' was used therein in the Canadian sense. In that Constitution there is an elaborate distribution of Legislative Powers, but in many respects there is the paramount authority and predominance of Dominion Laws. (Lefroy: Canada's Federal System, Ch. X). Section 91 contains the list of subjects within the exclusive authority of the Dominion Parliament, and includes "the raising of Money by any Mode of System of Taxation". But under S. 92, "Direct taxation within the Province" is *inter alia* among matters within the exclusive power of the Provincial Legislatures, as also generally all matters of a merely local or private nature in the province. Under S. 122 the Customs and Excise Laws can be altered by the Parliament of Canada. Tax on the sale of goods is not specifically mentioned anywhere. The category of a tax not expressly mentioned in either list would ordinarily be determined according to its being direct or indirect taxation. Thus generally Canadian decisions turn on the meaning and scope of the words "direct taxation" and are easily distinguishable.

Up to the Confederation, the distinction between direct and indirect taxation was solely of academic or scientific importance. Until the Act of 1867 was passed, the division of taxation into direct and indirect belonged

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solely to the province of political economy so far as taxation in Great Britain, Ireland or any of the Colonies was concerned, and there was no recognised definition of either class universally accepted. But "it became from that moment essential for courts for the purposes of that statute to ascertain and define the meaning of the phrase 'direct taxation' as used in such legislation".[20]

According to the rule first laid down in *Attorney-General for Quebec* v. *Walter Reed*,[21] one had to look, following John Stuart Mill,

"to the ultimate incidence of the taxation as compared with the moment of time at which it is to be paid, a direct tax being one demanded from the very persons who it is intended or desired should pay it" (p. 143).

"The best general rule is to look to the time of payment; and if at the time the ultimate incidence is uncertain, then it cannot, in this view, be called direct taxation" (p. 144) (*per* Earl of Selbourne, L C.).

Later in the *Bank of Toronto* v. *Lambe*,[22] where a tax had been imposed on Banks varying in amount with the paid up capital and the number of offices, Lord Hobhouse adopted, as a fair basis for testing the character of a tax, Mill's definition that,

"Taxes are either direct or indirect. A direct tax is one which is demanded from the very persons who it is intended or desired should pay it. . . . . . Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another, such are the excise or customs."

But Mill's condition that 'to be strictly direct a tax must be general', which may be sound or unsound for economic purposes, was rejected for legal purposes.

In *Brewers and Malsters Association of Ontario* v. *Attorney-General for Ontario*,[23] the same definition was followed and it was held that requiring every brewer or distiller to obtain a licence to sell wholesale was direct taxation.

The same test was applied by their Lordships in several later cases. In *Cotton* v. *Rex*,[24] Lord Moulton remarked:

"The meaning to be attributed to the phrase 'direct taxation' in S. 92 of the British North America Act is substantially the definition quoted above (*i.e.*, in Lambe's case) from the treatise of John Stuart Mill, and that this question is no longer open to discussion."

In that case the Statute had authorised the collection of succession duty on the estate of a deceased person from the person making the declaration; it was held to be an indirect taxation as the declarant may happen to be a notary, even though under S. 3 of the Act he was not personally liable. This case was explained by Lord Phillimore in a similar case of *Burland* v. *The King*,[25] as containing not a wayside dictum but a complete

20. Per *Lord Moulton* in *Cotton* v. *Rex*, (1914) A.C. 176 at 190.
21. (1884) 10 A.C. 141.
22. (1887) 12 A.C. 575 at 581.
23. (1897) A.C. 231.
24. (1914) A.C. 176 at 193.
25. (1922) A.C. 215.

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and fundamental decision, even though there was no common practice for the notary to make the declaration, because "the principle remains the same and could equally well have been illustrated by the cases of the executor or administrator or legatee by a particular title".

In the *City of Halifax* v. *Fairbank's Estate,*[1] where a Statute had imposed a business tax to be paid by every occupier of real property for the purposes of any trade, profession or other calling carried on for the purpose of gain, the owner being deemed to be the occupier where property was let to the Crown or any person exempt from taxation, Viscount Cave laid down, "Taxes on property or income were everywhere treated as direct taxes" and that Mill's formula could not alter their classification.

In the case of the *Attorney-General for British Columbia* v. *Canadian Pacific Railway Company,*[2] the Provincial Fuel-Oil Tax Act, 1923, enacted that every person who purchases within the Province fuel-oil sold for the first time after its manufacture in or importation into the Province should pay for Provincial purposes a tax equal to one-half cent. per gallon on the oil so purchased "Purchaser" (who was to pay the tax) was defined as a person who within the Province purchases fuel-oil when sold for the first time after its manufacture in or importation into the Province; and "vendor" (who was to levy, collect and pay it to Government) was to mean any person who within the Province sells fuel-oil for the first time after its manufacture or an importation into the Province. There was also a liability on every person who had in his possession for use or consumption fuel-oil on which tax had not been paid. The Railway Company used to purchase oil in British Columbia from an Oil Company, and the oil they purchased was used by themselves alone and was not then re-sold. It was held that the tax was all the same indirect, and therefore beyond the competence of the Province. Viscount Haldane laid down that:

"Validity in accordance with (general) tendencies, and not according to results in insulated or merely particular instances, must be the test".

The principle of construction as established was satisfied because the Railway Company could develop their business so as to include re-sale of the oil they bought. Fuel-oil being a marketable commodity, those who purchased it, even for their own use, acquire the right to take it into the market; and therefore the tax comes within the general principle, determining that it is indirect. His Lordship emphasised that the first and the cardinal question was whether the tax was direct or indirect His Lordship did not lay down that the tax was an excise duty

The position has been reconsidered recently by Lord Thankerton in *Attorney-General for British Columbia* v. *Kingcome Navigation Co., Ltd.,*[3] where the Fuel-Oil Tax Act of British Columbia, 1930, as amended in 1932, required 'every person who consumes any fuel-oil in the Province to pay . . . a tax . . at the rate of one-half cent a gallon' and prohibited

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1. (1928) A.C. 117.
2. (1927) A.C. 934.
3. (1934) A.C. 45.

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the keeping for sale or selling fuel-oil without a licence. His Lordship has held that,

"the test to be applied in determining what is 'direct taxation' within the meaning of S. 92, head 2, of the Act of 1867, is to be found in Mill's definition of direct and indirect tax".

"If the tax is demanded from the very persons who it is intended as desired should pay it, the taxation is direct, and that it is none the less direct, even if it might be described as an excise tax, for instance, or is collected as an excise tax" (p. 55).

"Duties of customs and excise were regarded by every one as typical instances of indirect taxation" (p. 56).

The tax was held to be a direct tax on three main grounds: (1) The Act purports to exact the tax from a person who has consumed fuel-oil, the amount of tax being computed broadly according to the amount consumed. (2) It does not relate to any commercial transaction in the commodity between the tax-payer and some one else. (3) There is no justification for the suggestion that the tax is truly imposed in respect of the transaction by which the tax-payer acquired the property in the fuel-oil, nor in respect of any contract or arrangement under which the oil is consumed, though it is, of course, possible that individual tax-payers may recoup themselves by such a contract or arrangement. It was further held that except that the Act taxes persons in respect of a commercial commodity, which is not produced in its raw state within the province, there is nothing in the Act to suggest that its purpose was the regulation of trade or commerce. His Lordship laid down at p. 57:

"The ultimate incidence of the tax in the sense of the political economist is to be disregarded when the tax is imposed in respect of a transaction, the taxing authority being indifferent as to which of the parties to the transaction ultimately bears the burden. . . . . Where the tax is imposed in respect of some dealing with commodities, such as their import or sale or production for sale, the tax is not a peculiar contribution upon the one of the parties trading in the particular commodity, who is selected as the tax-payer."

It must therefore be now taken as authoritatively settled that a tax on the consumer based on the amount consumed is a direct tax, and by no means an excise duty in Canada, and is fully within the competence of a Provincial legislature. The English or American conception that excise may be an inland imposition on consumption of home commodities has therefore been definitely negatived and is no longer tenable. It is equally clear that mere licences would not be excise duty.

The Commonwealth of *Australia Constitution Act*, 1900, being the product of the Constituent Convention was practically drafted in Australia by Australians for Australia. Accordingly the word "excise" used in this Constitution would have the meaning which it had there about that time. The scheme is to confer definite powers on the Commonwealth, and preserve to the States all powers not exclusively conferred on the Commonwealth. Thus there can be overlapping. Section 107 provides that:

"Every power of the Parliament of a Colony which has become or becomes a State shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the

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establishment of the Commonwealth or as at the admission or establishment of the State as the case may be".

The Parliament has under S. 51 power to make laws, among others "Taxation, but so as not to discriminate between States or parts of States". Under S. 90 Parliament has exclusive power to impose "uniform duties of customs and of excise and to grant bounties on the production or export of goods". Under S. 92 "on the imposition of uniform duties of customs, trade, commerce and intercourse among the States whether by means of internal carriage or ocean navigation, shall be absolutely free". In the Australian Constitution also "taxation on the sale of goods" has not in so many terms been mentioned anywhere, nor is 'direct tax' mentioned specifically.

In *Peterswald* v. *Bartley*,[4] the question arose as to a Liquor Act prohibiting the carrying on the business of a brewer without a proper licence. In view of the words "the duties of excise paid on goods produced and manufactured in a State" used in S. 93, the High Court held that a licence fee is not a tax on the goods themselves, and is not an indirect tax, as the amount in no way depends on the quantity of beer manufactured, and there is no expectation or intention that the person paying it should indemnify himself by passing it on. Rejecting the larger view, it was held that "the basic principle of excise duties was that they were taxes on the production and manufacture of articles which could not be taxed through the Customs House" (p. 508), that:

> "the fundamental conception of the term (excise) is that of a tax on articles produced or manufactured in a country"

and that:

> "the conclusion is almost inevitable that whenever it is used, it is intended to mean a duty analogous to a customs duty imposed upon goods either in relation to quantity or value when produced or manufactured and not in the sense of a direct tax or personal tax" (p. 509).

It was further remarked that the term "duties of excise in the Constitution was limited to taxes imposed upon goods in process of manufacture". Notwithstanding the modern tendency in England to use the word "excise" as including all kinds of inland revenue taxation which come under the control of the Commissioners the licence fee was not a duty of excise, even though it was a kind of an inland revenue impost.

In the case of *The King* v. *Barger*,[5] the Commonwealth Excise Tariff Act, 1906, had imposed duties of excise on certain specified goods exempting goods manufactured under certain conditions of labour as to manufacture. It was held that the Act in substance was not an Excise Act, not being an exercise of the power of taxation, but an attempt to regulate internal trade and industry. The restricted meaning given to the expression "the duties

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4. (1903-4) 1 C.L.R. 497.

5. (1908) 6 C.L.R. 41.

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of excise paid on goods produced or manufactured in a State" in *Peterswald* v. *Bartley*[6] was quoted with approval on pages 73-4 and 117.

Strong reliance has been placed on the *Commonwealth* v. *The Commonwealth Oil Refineries*,[7] which is certainly an important case dealing with the power of a State to impose a tax on first sales of motor spirit. South Australia had passed a Statute in 1925, Taxation (Motor Spirit Vendors) Act, which by S. 2 defined a "vendor" as "every person who sells and delivers motor spirit within the State to persons within the State *for the first time* after the entry of such motor spirit into the State, or as the case may be, after production, refinement, manufacture or compounding of such motor spirit within the State, but not including any purchaser of such motor spirit who subsequently sells the same. Under S. 4 a tax, under the name of income-tax was imposed at 3*d.* per gallon of motor spirit sold by any vendor within the State, excluding spirit sold or delivered for export. Under S. 7 there was also a tax on consumers of a certain excess quantity. Under an Act of 1926 it was provided that if satisfactory arrangements are made between the commonwealth and a State for payment of customs or excise on motor spirit, the Act would be satisfied and tax reduced. Motor spirit used to be imported into the State from U.S.A. and other places beyond the seas, Refineries refined crude petrol oil in the State of Victoria and then consigned the refined oil to their Agents in South Australia.

Various and not necessarily unanimous reasons were given by the several learned Judges in support of the view that the Act was beyond the power of the State. (1) The tax was called an Income-tax, which obviously it could not be as it was not a tax even on gross income, much less on net income, but on the first sale of a quantity, irrespective of quality or value. (2) The tax on imported goods before they had become part of the general mass of property of the State, first sale taking place mostly while the spirit was still contained in the original tins and cases, would be in the nature of an impost levied on imports. (3) The tax on the first sales of the goods after production, refinement, manufacture or compounding was bound to be added on to the price and passed on to the vendee and ultimately to the consumer, and therefore was not a direct tax, but an excise duty. (4) Constitutional prohibition does not cease the moment the goods entered the State, and the tax on first sales though imposed after entry was as effectual in the way of hampering Commerce between State and State as a tax imposed on entry. It is clear that the decision went in favour of the Commonwealth, because the tax was on first sales. The majority of the learned Judges held it to be an excise duty not merely because it was a tax on sales, but because it was a tax on *first* sales. Knox, C.J., with whom Powers, J., agreed said:

> "In effect, the tax is payable by every producer in the State of motor spirit on all spirit produced by him within the State except so much thereof as is not sold or is sold for export from the State." (P. 420.)

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6. (1903-4) 1 C.L.R. 497.
7. (1926-7) 38 C.L.R. 408.

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Isaacs, J., declining to adopt the extended meaning said:

"Licences to sell liquor or other articles may well come within an excise duty law, if they are so connected with the production of the article sold or are otherwise imposed as in effect to be a method of taxing the production of the article. But if in fact unconnected with production and imposed merely with respect to the sale of goods as existing articles of trade and commerce, independently of the fact of their local production, a licence or tax on the sale appears to me to fall into a classification of governmental power outside the true content of the words 'excise duties' as used in the Constitution." (P. 426.)

Starke, J., said:

"If a tax upon the sale of a commodity be in substance a tax upon the commodity, here we have a tax which operates in many cases as a tax upon the producer and in respect of the production of the commodity by him. That, in my opinion, is an excise duty." (P. 439.)

Garan Duffy, J., agreed with the conclusion. Only Higgins and Rich, JJ., based their judgments on the wider meaning of "excise duty". In Australia the States have no general power to impose taxes on sales. This was a case of first sale and not the last retail sale to the consumer, to which much of the reasoning would have been inapplicable. Had excise duty included sales at every stage much of the elaborate discussions would have been wholly unnecessary.

In *James* v. *Commonwealth of Australia,*[8] Lord Wright, M. R., in delivering the judgment held that S. 92 binds the Commonwealth and approved of an Australian case *Vacuum Oil Co Pty, Ltd.* v. *Queensland,*[9] in which it had been held that a burden placed (in substance) on the first seller in the State of imported petroleum was in truth, though not in form, a sort of tax or impost by remarking "so regarded, it clearly infringed S. 92, though its operation and incidence only took effect at an interval after the border was passed". It infringed S. 92 because it interfered with trade and commerce. The High Court unanimously held that it was neither a duty of customs, nor of excise nor a bounty within the meaning of S. 90 His Lordship did not say that S. 90 was infringed. (Pp. 623-4.)

There is thus no doubt whatsoever that in Australia a tax imposed on *first* sales being connected with either import or manufacture or production of goods is outside the competence of a State But not a single Australian case has been cited where a tax on retail sale has been held to be an excise duty.

Fortunately *in India* it is not necessary to revive the fine niceties of distinction between direct and indirect taxation, as no such division exists in the Act. Indeed, there are several taxes like taxes on luxuries or trade which can be indirect; and some taxes like succession duties (and even excise) have in parts been assigned to both. The ultimate incidence of the tax is certainly not a crucial test under the Indian Constitution. There is no justification for adopting any such principle as that certain classes

8. (1936) A.C. 578.

9. (1934) 51 C.L.R. 108.

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of duties which are to be regarded as direct have been assigned to the Provinces, and other classes regarded as indirect have been reserved for the Federation.

The rules of interpretation are perfectly clear. It was observed by the Lord Chancellor in *Brophy* v. *Attorney-General for Manitoba*,[10] that:

"the function of a tribunal is limited to construing the words employed; it is not justified in forcing into them a meaning which they cannot reasonably bear. Its duty is to interpret, not to enact."

At p. 216 it was remarked:

"The question is not what may be supposed to have been intended, but what has been said. More complete effect might in some cases be given to the intentions of the Legislature, if violence were done to the language in which their legislation has taken shape; but such a course would, on the whole, be quite as likely to defeat as to further the object which was in view."

It was observed by Lord Wright, M. R., in *James* v. *Commonwealth of Australia*[11]:

"The question then is one of construction and in the ultimate resort must be determined upon the actual words used read not in vacuo but as occurring in a single complex instrument in which one part may throw light on another. The constitution has been described as the federal compact and the construction must hold a balance between all its parts."

Schedule VII of the Government of India Act contains a careful and detailed distribution of legislative powers enumerated in Federal, Provincial and Concurrent Legislative Lists. In this respect the classification differs very materially from those prevailing in the Dominions. There is no general power given to the Federation to impose indirect taxes, nor any general power given to the Provinces to impose direct taxes. The heads have been separately specified in great detail; and a special head "taxes on the sale of goods" has been assigned to the Provinces which did not at all find a separate and distinct place in the State or Provincial list of any of the Dominions. This peculiarity is a unique feature of the Indian Constitution, having an important bearing on the present case, as taxes on sales have been adopted as a post-war measure in most countries.

In spite of these separate lists a difficulty may arise from the fact that some heads overlap, as the groupings cannot be absolutely perfect. When overlapping is unavoidable, the provisions of S. 100 operate, as it provides that the Federal Legislature has power to make laws with respect to matters in List I "notwithstanding anything in the two next succeeding sub-sections" and has power to make laws with respect to matters in List III "notwithstanding anything in the next succeeding sub-sections". Whereas a Provincial Legislature also has power to make laws with regard to matters in List III "subject to the first sub-section" and has power to make laws with respect to matters in List II "subject to the two preceding sections". It follows that in the case of an inevitable conflict between the powers of the Federal and the Provincial Legislatures the

10. (1895) A.C. 202 at 215.

11. (1936) A.C. 578 at 613.

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former would prevail in respect of Lists I and III, S. 100 being the last refuge.

As two separate Lists exist, the Imperial Parliament should be presumed to have intended to keep the Federal and Provincial Lists mutually exclusive as far as possible. It should certainly be our earnest endeavour to avoid a conflict between two apparently competing entries. Too liberal an interpretation given to both of them would simply create a conflict. As it is a Provincial Act which is challenged, the proper way of approach is to see whether the taxation imposed falls within the Provincial Entry. and then to see whether it is in any way cut down or restricted.

In *The Queen* v. *Burah*,[12] Lord Selbourne remarked:

"The established Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created and by which, negatively, they are restricted If what has been done is legislation, within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited, it is not for any Court of Justice to inquire further; or to enlarge constructively those conditions or restrictions." (Pp. 904-5.)

It was emphasised in *The Citizens Insurance Co.* v *William Parsons*,[13] that:

"It is the duty of the Courts, however difficult it may be, to ascertain in what degree, and to what extent authority to deal with matters falling within these classes of subjects exists in each legislature, and to define in the particular case before them the limits of their respective powers. It could not have been the intention that a conflict should exist and in order to prevent such a result, the two sections must be read together, and the language of one interpreted, and where necessary modified by that of the other. In this way it may in most cases be found possible to arrive at a reasonable and practical construction of the language of the sections so as to reconcile the respective powers they contain and give effect to all of them"

In the above case at p. 108 it was further said:

"Notwithstanding this endeavour to give pre-eminence to the dominion parliament in cases of a conflict of powers, it is obvious that in some cases where this apparent conflict exists, the legislature could not have intended that the powers exclusively assigned to the provincial legislature should be absorbed in those given to the dominion parliament."

So far as the Government of India Act is concerned there is really no doubt that Parliament has chosen to use an expression which narrows the scope of excise duties, and consequently limits the legislative power of the Centre. Entry No. 45 of List I refers to "duties of excise on tobacco and other goods manufactured or produced in India, etc." Unquestionably, no duty would be regarded as a duty of excise under Entry No. 45 unless it is on goods (at least other than tobacco) manufactured or produced in India. For purposes of such goods the wider English sense is necessarily excluded. And the word "goods" has been used in the widest possible

12. 3 A.C. p. 889.
13. (1881-2) 7 A.C. 96 at 109.

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sense, for under S. 311 "goods" includes all materials, commodities and articles.

It can hardly be disputed that if there were nothing else in the Act. tax.on retail sale of motor spirits and lubricants would fall within the scope of the express words "tax on the sale of goods" used in List II, Entry No. 48. The main question in the present case therefore is whether the tax on retail sales also comes within the category "duties of excise on goods manufactured or produced in India" so far at any rate as concerns goods manufactured or produced in this country.

In the same List II there are two separate categories. Entry No. 40 refers to "duties of excise" on certain specified goods and Entry No. 48 to "taxes on the sale of goods". The Imperial Parliament presumably intended these categories to be separate and distinct, and not that "sale" of the specified goods be included in the "duties of excise" on them. Similarly it should be presumed that when "duties of excise" were assigned to the Federation and "taxes on the sale of goods" to the Provinces, it was intended that these categories were mutually exclusive, or at any rate not intended that the latter should be wholly included in and completely absorbed by the former. Although in List II—49 the words used are "for consumption, use or sale therein", List I—45 does not say "goods manufactured or produced or sold or consumed in India". Obviously the power to tax the sale of goods is quite distinct from any right to impose taxes on use or consumption. It cannot be exercised at the earlier stage of import or manufacture or production, nor at the later stage of use or consumption, but only at the stage of sale. The successive stages of manufacture or production, sale, use or consumption are separate, and it is possible to impose duty at any of these stages. There is a fine distinction between taxes on the sale of goods and taxes on the goods themselves. The essence of a tax on goods manufactured or produced is that the right to levy it accrues by virtue of their manufacture or production. It is immaterial whether the goods are actually sold or consumed by the owner or even destroyed before they can be used. If duty is imposed on the goods manufactured or produced when they issue from the manufactory, then the duty becomes leviable independently of the purpose for which they leave it and irrespective of what happens to them later. On the other hand, a duty on the sale of goods cannot be levied merely because goods have been manufactured or produced. Nor can it be levied merely because the goods have been consumed or used or even destroyed. The right to levy the duty would not at all come into existence before the time of the sale. It cannot at all be levied unless the goods are actually sold, and may not be leviable if they are transferred in some other form. Thus a duty on goods manufactured or produced is distinct, separate and independent from a duty on their sale and (except probably at the stage of the first sale) there seems to be no good reason why they may not co-exist without overlapping.

I doubt if it would be at all legitimate to examine the words previously used in the entries in the lists appended to the White Paper (which were

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professedly illustrative, not purporting to be either complete or final) or to those in the Joint Committee's Report (which were later carefully revised and largely recast), corresponding to the entries now under consideration, and then to speculate why the phraseologies were changed. If the removal of the words "on the production and manufacture" in the old Entry No. 36 of List I would support one view, then the deletion of the word "turnover" from the old Entry No. 10 of List II might strongly support the other. It would not, strictly speaking, have been correct to use the words "duty of excise on manufacture or production of goods", unless the duty were intended to be levied on the processes of manufacture or production, irrespective of the quantity manufactured or produced. Those words would also have necessarily excluded first sales. If the intention is to impose the duty on the goods themselves provided they are manufactured or produced in India, then the only correct way to express the idea is to say "duty of excise on goods manufactured or produced in India". Opinions expressed by Committees, prior even to the Joint Committee, are all the more irrelevant.

There is really nothing absolutely irreconcilable between Excise duty mentioned in Entry No. 45 of List I and tax on retail sales included in Entry No. 48 of List II. They can be mutually exclusive, so as not to bring in operation the provisions of S. 100 at all. Excise duties can be imposed by the Centre on motor spirits and lubricants manufactured or produced at the place or in the Province of their origin, while the Central Provinces and Berar can impose a tax on the retail sale of all such goods (both foreign and Indian) within the Province. It is not at all clear why the Centre which can easily impose an excise duty at an earlier stage should try to follow the petrol after it has been exported from the Province of its origin into other autonomous Provinces and impose excise duties on retail sales there after the commodity has become a part of the general stock in such Provinces, and, in the case of some other goods, mixed up with and become indistinguishable from similar foreign products. The suggestion that manufacture or production itself may be seriously affected is rather far-fetched.

Under the Central Provinces and Berar Sales of Motor Spirit and Lubricants *Taxation Act*, 1938, S. 3, a tax is to be "levied and collected from every retail dealer. ..on the retail sales . ..at the rate of 5 per cent. on the value of such sales". In S. 2 (*e*) a "retail dealer" is defined as a person who on commission or otherwise sells or keeps for sale motor spirit or lubricant for the purposes of consumption by the person by whom or on whose behalf it is or may be purchased; and "retail sale" means a sale by a retail dealer to a person for the purpose of consumption by the person by whom or on whose behalf it is or may be purchased The machinery for collecting the tax is a subsidiary thing.

It is clear that the tax is levied and collected from the last vendor who passes the goods on to the person who consumes them. The imposition is therefore on the last sale. If a tax has to be imposed on sales, this would be the last occasion on which it can be done, if at all. Tax on retail sale

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will immediately affect the consumer, who becomes known at that stage According to the rule laid down in Walter Reed's case, at that point of time, "the ultimate incidence is certain." The tax relates to commercial transactions in the commodities between the tax-payer and the consumer. It is wholly unconnected with manufacture or production. There is every reason to take it as a tax truly imposed in respect of the transaction of sale.

The object of the taxation is not to impose any special burden on goods manufactured or produced in India. The principal object is to recover revenue on all sales irrespective of the origin of the goods. The amount assessed depends exclusively on the sale price and on nothing else. A tax on the sale of goods, whether originally imported or locally produced or manufactured in a Province, which have become mixed up with the general mass of property in that Province about to pass into the hands of the consumer has hardly any resemblance to an import duty or even an excise duty on manufacture or production. In its nature, it is a purely domestic transaction with which the other Provinces or India as a whole cannot be concerned. When last sales are taxed, the imposition is simply on goods as an existing substance in the Province, no longer subject to all-India considerations and sold in the Province to local consumers for consumption or use. Such sales being a purely provincial operation ought to be within the power of the Province to tax them.

Some petrol is admittedly produced in Attock in the Punjab; but the vast bulk of petrol consumed in this country comes from outside, particularly as now Burma is no part of India. The tax on sales would affect equally both Attock petrol as well as foreign petrol. The Act does not earmark Attock petrol for the imposition of the duty. Indeed it makes no distinction as regards variety. It cannot therefore be suggested that Attock petrol would be at a disadvantage as compared to foreign petrol. As Attock production is insignificant when compared with the total quantity of motor spirits consumed in India, the tax on sales of all motor spirits in the Central Provinces and Berar can hardly be regarded as an excise duty imposed on the spirits produced in the Punjab. Indeed, on the contrary it may with greater plausibility be said to be an import duty on foreign motor spirits.

In Canadian cases, the Privy Council has held that a tax on the producer or manufacturer is indirect, like the percentage tax upon the gross revenue received from the sales of coal by the owner of a coal mine, as was the case in *The King* v. *The Caledonian Collieries.*[14] There is the direct authority of the case of *The Attorney-General for British Columbia* v. *The Canadian Pacific Railway,*[15] that a tax on first sales is an indirect tax and therefore not within the competence of a State or Province. Their Lordships did not expressly say that it was an import or excise duty, much less that taxes on even subsequent sales would be excise duties. On the other

14. (1928) A.C. 358.
15. (1927) A.C. 934.

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hand, in the case of *Kingcome Navigation Company*,[16] their Lordships have laid down that a Provincial tax on consumers is direct and therefore perfectly valid. The present case lies in between, involving a tax on retail sale which is midway between the first sale and the ultimate consumption. The demand would be made from the retail seller who would certainly add it on to the price and recover it from the consumer, on whom the burden will ultimately fall. At the time the tax is paid, it is fully ascertained where the incidence would be, though the tax is demanded from a person who it is not intended should himself bear the burden. According to the test laid down in the series of cases decided by their Lordships of the Privy Council (subsequent to the case of *Walter Reed*) particularly the case of *Cotton* v. *The King* and *Burland* v. *The King*, there can be no doubt whatsoever that the retail tax in question is indirect. But that is not a conclusive test under the Indian Act. The fact that it is an indirect taxation does not exhaust the whole question, as it would not necessarily follow that the tax is an excise duty within the meaning of Entry No. 45.

A clear distinction exists between the *first sale* and the last sale, as the latter is not intimately connected with the manufacturer or the producer and cannot come within the scope of excise duty. In the *Commonwealth Oil Refineries case*, the observation of Isaacs, J., at p. 426 already quoted supports the view that if the tax is unconnected with production or manufacture, then it is not an excise duty. His observation was not confined to licences only but expressly referred to a "tax on the sale". In that case most of the learned Judges took the view that ordinarily a tax on first sale of home products is connected with production and manufacture and is therefore a tax on production and manufacture and as such an excise duty. They had not to consider and therefore did not deal with retail sales at all; nor could their reasoning have applied to the last retail sale to the consumer.

Taking goods manufactured or produced in India, the time of the first sale is ordinarily the time of the sale by the manufacturer. The manufacturer or producer is directly concerned with this transaction and the tax is demanded from him when he sells the goods. It is not then certain which consumer will bear it. For all practical purposes, it is a tax on the manufacturer or producer, and the burden is in the first instance imposed on him, though, of course, it being an indirect imposition, he can pass it on; but the essence is that the tax is imposed on a sale *by* the producer or the manufacturer and not on a sale by any subsequent vendor.

The case of tax on retail sale is just the reverse. There ordinarily the original manufacturer or producer is not directly concerned, but at the time of the retail sale the retail seller will charge the extra amount from the consumer directly. It is known at the time which consumer will bear it. The tax on retail sale is more or less connected with the consumer, while a tax on the first sale is similarly connected with the producer.

If the words of Entry No. 48 "Taxes on the sale of goods" were to be taken in their ordinary and natural meaning, they would include even first

16. (1934) A.C. 45.

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sales. It is not necessary to decide any such question in the present case, but it may as well be pointed out that there may be some difficulty in upholding a Provincial tax on first sales. For instance, if the Bombay Province were to impose a duty on first sales of certain specified articles, which are mainly imported from abroad, the tax may well approach an import duty Or again, if Bengal were to put a tax on first sales of Jute manufactured or produced in the Province, when Jute is principally produced in that Province, it may well resemble an excise duty. In extreme cases, the imposition of duty on sales may either be so closely connected with imports as to become a customs duty, or so closely connected with production or manufacture as to become an excise duty, although it purports to be merely a tax on first sales of such goods. It is the pith and substance of the Act and not its form which will be the decisive factor. (*A. G. for Ontario* v. *Reciprocal Insurers.*[17] A Province may therefore not have power to tax such first sales; but taxation of retail sales is not governed by such considerations.

It is true that in some cases the first sale in the Province may itself be a retail sale to the consumer, for instance a sale by a manufacturing retailer. This would not ordinarily be so where the goods are manufactured or produced outside the Province, except in the very special case where a consumer orders goods direct from an outside manufacturer or producer, and under the terms of the contract between them, the transaction of sale is completed within the Province. But an Act cannot be invalidated merely on account of its peculiar operation in special individual cases, and must be judged by its ordinary effect:

> "The Legislature cannot possibly have meant to give a power of taxation valid or invalid according to its actual results in particular cases. It must have contemplated some tangible dividing line referable to and ascertainable by the general tendencies of the tax and the common understanding of men as to those tendencies."[18-20]

When the Centre may never impose excise duty except on a few selected classes of articles there seems to be no good reason for *depriving the provinces* of their power to tax the retail sales of all. If tax on retail sales of every possible kind of home products were outside the power of a Province, then it is difficult to see how strictly speaking any tax can be imposed on the sale of any goods under Entry No. 48. To give a natural meaning to this entry retail sales to consumers should not be regarded as excise. So long as the goods taxed are not produced in India and are wholly imported, a tax on their sale would, no doubt, not be an excise duty, and may remotely resemble an additional import duty in the case of first sales. But as soon as any quantity, howsoever small, begins to be produced or manufactured anywhere in India, the tax which was perfectly valid at first would suddenly become invalid at least *qua* such properties (even not considering for the moment the argument of the Advocate-General of India that it is invalid both as regards home and foreign products). The validity or invalidity would then depend on the identity of the goods. In most cases it may

17. (1924) A.C. 328 at 337.

18-20. Per *Lord Hobhouse* in *Bank of Toronto* v. *Lambe,* 12 A.C. 575 at 581.

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be impossible to trace the origin of the goods, although it must be conceded that in the case of petrol so long as it is contained in the original tins and cases, its origin may be easy to discover. But there may well be other kinds of goods which may be almost similar to goods imported from outside and it may well be difficult to distinguish one kind from another. A tax on the sale of such kinds of goods would according to the contention of the Advocate-General of India be invalid. So long as there is any small quantity produced in India which cannot be identified and distinguished from similar goods imported from abroad, the duty even on the last retail sale would become an excise duty. It could hardly have been intended that, in order to test the validity, Courts should embark upon an enquiry into the varieties of home products. Such a conclusion would lead to an almost impossible position and would practically nullify the power expressly given to the Provinces to impose taxes on the sale of goods. It should be presumed that the Imperial Parliament did mean to give to the Provinces the power to tax sale of goods, as it has said, and not that the power was merely illusory. Unless at least retail sales come within the category "sale of goods", power to impose a tax on sales of home products under Entry No. 48 would be almost non-existent. If retail sales tax on every possible kind of home commodities is wholly outside the legislative competence of the Provinces, then practically the only power which would remain under Entry No. 48 would be to impose a tax on the sales of imported goods, which might in extreme cases conflict with S. 297 (1) (*a*).

The learned Advocate-General of India is forced to admit that if his contention prevails, then the only taxes that would not amount to excise duty and would be left over for the Provinces to impose under Entry No. 48 would be certain licence fees and certain *turnover taxes.*

As regards licence fees, if we leave aside the wide meaning that has been given to the word 'excise' in England owing to historical reasons and convenience of collection, such fees can hardly be regarded as in themselves being a "tax on the sale of goods", and can come in only impliedly within that power.

It can also hardly be suggested that the words "taxes on the sale of goods" are the exact equivalent of "sales tax" or "turnover tax". In the first place, it is dangerous to substitute for the words actually used in an Act new colloquial expressions which have come to connote a definite meaning in common parlance and then to interpret the words used in the light of the meaning of the latter colloquial words. It is safer to adhere strictly to the words actually employed. In the second place, even "a sales tax", which has come into vogue since the Great War, includes a variety of forms of taxation in various countries, without any definite uniformity. As shown below, it is by no means confined, even in the sense used by economists, to taxes on sales of goods generally, without specifying particular goods.

Findlay Shirras in his Science of Public Finance, Vol. II (3rd Edition), p 606, has expressed the opinion that in reality there is no clear distinction between a sales tax and a turnover tax. It may possibly be difficult to agree with this view because a turnover tax in some countries includes

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taxation on services, fees, commissions, interest, and other payments (as in France) whereas a sales tax strictly speaking can hardly comprise these As regards the variety of sales tax he has noted on page 610:

"The tax may be general, as in France or Germany, or retail transactions may be excluded, as in Belgium. It may be, as is common in the states of the American Union, confined to retail transactions. It may be imposed, as in Canada and Australia, as a producers' or manufacturers' tax, and it may be on classified industries or trades only. It may be levied on nearly all goods and services, as in Germany. It may exempt certain sales, as in France, where the sales of farmers are exempted unless they are carrying on manufacture as well as agriculture."

On pages 608-9 he has tabulated the bases of sales taxes as including total turnover sales of commodities except at retail, sales of producers, manufacturers, and importers only, sales of producers and importers only. sales of wholesalers and manufacturing retailers, sales of merchants, manufacturers, receipts of printers, publishers, contractors, public utilities; etc.

H. L. Lutz in his Public Finance (3rd Edition), p. 632, has also pointed out that

"The sales taxes now in effect are not easily classified. The most clearly defined type is the retail sales tax, which is levied upon the sale of tangible personal property at retail. The tax may apply to sales made by wholesalers and manufacturers as well as by retailers Or it may be still broader in scope and apply to the sales of services by public utilities and to admissions, in addition to sales of tangible property."

In the Encyclopædia of the Social Sciences, by Seligman and Johnson, Vol 13, p. 516, it is stated:

"The sales tax is a levy imposed upon the sales of commodities or services. The tax may be levied upon sales: in general, as in Germany; in general, except at retail, as in Belgium; in general, with other special taxes, as in France; of classified enterprises, as in Washington; of producers, as in Canada; or of retailers, as in Kentucky."

At p. 517 it is also stated:

"Sales taxes may be imposed upon total receipts, with deductions for returns, allowances, and possibly other items; upon the individual transaction; upon the privilege of conducting business, which is supposedly measured by sales; upon sales in general; or upon specified types of sales .Customarily the vendor rather than the vendee is liable for taxation, although both may be held responsible for proper payment of the tax."

A. Comstock in his Taxation in the Modern State p. 113 has observed:

"The scope of sales and turn-over taxes have varied greatly. Some extended to all transactions, both wholesale and retail, and others to wholesale transactions only. The first of these are usually called turn-over taxes. Certain taxes include both goods and services, while others include only goods. The German turnover tax is an example of a tax which includes nearly every type of transaction in the line of goods and services."

It is thus obvious that a turnover tax or a sales tax is not by any means co-extensive with "tax on the sale of goods". The first certainly includes services, fees, commissions, etc., which the third cannot The second may be a mere producers' or manufacturers' tax and may also possibly cover services and enterprises, which the third cannot. The third must necessarily be a tax imposed at the time of the *sale* of goods and must exclude

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other forms of transfer like mortgages, leases, etc. It is also certain that none of these can be confined strictly to taxes on sales generally without specifying any goods, that is to say, only on the total sale proceeds or turnover for the year; and they all include taxes on retail sales. The words "taxes on the sale of goods" are very general, and I see no good reason for confining their meaning to a turnover tax on the gross sale proceeds only, which may also possibly come under No. 46—taxes on trades. Had that been the intention, the words would have been "taxes on sales of goods generally" and not *the* sale of goods. The singular, of course, includes the plural; but the singular by no means excludes the singular, and so the words used must also cover separate individual sales as well. But even if we were so to confine the meaning, excise duty if it were to include taxes on the sales of goods may well cover such turnover taxes as well.

It can hardly be doubted that taxes on the sale of goods is a *special provision*. In the Canadian cases *Ontario* v. *Canada*,[21] *Marriage Legislation*, in re[21-a] and *Great West Saddlery Co* v. *The King*,[22] it was certainly said that what is particular may be regarded as an exception to what is general. But that can hardly apply to a Constitution where overlapping is definitely met by an express provision. The competing entries in the Federal and the Provincial Legislative lists have to be read together, to avoid an overlap. As far as possible, an undefined term should not be given such a wide scope as to include a particular provision. If there is no help, then only the power of the Federation over-rides that of the Provinces. The tax in question comes within the special and specific provision "taxes on the sale of goods" and can, only by defining and enlarging the meaning of the words "duties of excise on goods manufactured or produced in India", be brought within the scope of the latter. The special provision, even from this point of view, should be considered to be exclusive of the other.

Another principle which emerges from the Dominion cases is that in a Federal Constitution, Provincial Legislatures are independent within the spheres allowed to them and within the prescribed limits They are coordinate Governments and possess *full legislative power* and capacity to pass laws, so far as matters assigned to the Provinces exclusively are concerned. The Provinces are entrusted with the exclusive authority in certain specified matters, not of an all-India concern, but of Provincial interest. Subject to certain restrictions each Province retains its independence and autonomy and is not under the control of the Federal Legislature.

"Within these limits of area and subjects,.........its local legislature was to be supreme and had such powers as the Imperial Parliament possessed in the plenitude of its own freedom before it handed them over to the Dominion and the Provinces"[23]

In *Hodge* v. *The Queen*,[24] Sir Barnes Peacock stated that when the British North America Act enacted that the Provincial Legislative Assembly:

21 *Attorney-General for Ontario* v. *Attorney-General for Canada*, (1912) A.C. 571.

21-a. (1912) A.C. 880.

22. (1921) A.C. p. 215.

23. In re *Initiation and Referendum Act*, 1919 A.C. 935 at 942.

24. (1883) 9 A.C. 117 at 132.

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"should have exclusive authority to make laws for the Province and for Provincial purposes in relation to matters enumerated in S. 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by S. 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow."

It follows that if the words of a statute confer a power on the Provinces, it should not be withheld on any extraneous grounds.

The Advocate-General of India has not contended that S. 297 (1) (*a*) is likely to be infringed inasmuch as the Provincial law, though not prohibiting, restricts the entry into the Province of these Punjab goods. But S. 297 (1) (*b*) has been relied upon. It has been argued that if the tax on goods manufactured or produced in India is bad, then the Act would operate against foreign goods which as a result would involve a necessary discrimination. In the view that I have taken it is not necessary to decide this point finally. But that apparently may not be the idea underlying the sub-section which possibly does not deal with foreign countries at all. The marginal note, though not conclusive, is of some assistance, gives an indication of the drift of the provision, and suggests that the section applies to internal trade; but it may be said that internal trade may involve foreign goods as well. The first part of sub-S. (1) (*b*) refers to discrimination in favour of goods manufactured or produced in the Province as against goods not so manufactured or produced. *Prima facie* there is no such discrimination intended, as the tax is imposed on sales of motor spirit and lubricants in general; and also it so happens that none is produced within the Province in favour of which there could be any discrimination. Nor does it appear that intention is a necessary ingredient in this sub-section, it would be quite sufficient if the provisions result in discrimination. The power to tax is not taken away, only preference is prohibited. The second part also is probably inapplicable inasmuch as there is no discrimination at all between goods manufactured or produced in one locality and those in another locality. The word "locality" may mean a local area, *i.e*, some part of India and may not refer to countries outside India, or it may possibly have a wider application. To hold that the taxation is wholly invalid we would have to hold that it is both an excise duty and an import duty, according to the respective origin of the goods sold. The nature and character of the taxation would then depend on particular goods sold, and not merely on the sales of goods of a particular class. These matters can be considered when it becomes necessary to decide the point.

Reliance has been placed on the observation in *E. R. Croft* v. *Sylvester Dunphy*,[25] that;

"When a power is conferred to legislate on a particular topic it is important, in determining the scope of the power to have regard to what is ordinarily treated as embraced within that topic in *legislative practice* and particularly in the legislative practice of the State which has conferred the power". (P. 165).

That was a case where the Dominion Parliament had enacted provisions similar in scope to those which had long been an integral part of

25. (1933) A.C. 156.

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Imperial customs legislation, as shown by the various Hovering Acts, and their Lordships held that in bestowing plenary powers to legislate in relation to customs it was difficult to conceive that the Imperial Parliament had withheld some.

Here there is nothing in the pre-existing Legislative Practice to suggest that excise duty had been actually levied on retail sales. Under the Devolution Rules, framed under S. 45-A of the Government of India Act, 1919, Central and Provincial subjects were classified into two Parts, and the subjects enumerated in the second, which devolved on the Provinces, included serial No. 16 "Excise, that is to say, the control of production, manufacture, possession, transport, purchase and sales of alcoholic liquor and intoxicating drugs, and the levying of excise duties and licence fees on or in relation to such articles, but excluding in the case of opium, control of cultivation, manufacture and sale for export" The provinces therefore possessed the administrative power to *control* sale of liquor and drugs, and as a legislative measure could *levy excise duties* on or in relation to such articles. The two are obviously not co-extensive. Power to levy excise duties on the "sale" of such articles was not in express terms conferred on them.

There are no less than seven Central Excise Acts imposing duties: (*i*) Act II of 1917 on Motor Spirit; (*ii*) Act XII of 1922 on Kerosene; (*iii*) Act XVIII of 1930 on Silver; (*iv*) Act XIV of 1934 on Sugar; (*v*) Act XVI of 1934 on Matches; (*vi*) Act XXIII of 1934 on Mechanical Lighters; and (*vii*) Act XXXI of 1934 on Iron and Steel respectively; and in all these, duty is levied at the factory or manufacturing works and is payable by the manufacturer; and the same was true of the repealed Cotton Duties Act XVII of 1894. In none of these Acts has any duty been imposed on retail sales. For instance, under the Motor Spirit Duties Act, 1917, excise duty is levied and collected at every manufactory on all motor spirit produced in such manufactory, but not on retail sales of such goods after they have by the first sale passed out of the factory. Provisions for rebate on exported goods would not establish that an excise duty must always be one imposed on consumption only.

Our attention has not been drawn to any Provincial enactment, which might have imposed any excise duty on the retail sale of motor spirits and lubricants, or for the matter of that on the retail sale of any other goods In particular, the Central Provinces Excise Act II of 1915 did not do that Under S. 17 a licence is required for sales. S. 18 only provides that the Local Government may lease out the right among others "of selling by wholesale or retail" on the grant of a lease or licence, but neither the premium (or monopoly price) nor the licence fee can be regarded as a "tax on the sale of goods" itself. Under S. 25 duty is leviable on all excisable articles imported, exported, transported, manufactured, cultivated or collected. But that too is not an excise duty on the *sale* of goods. Under S. 26 duty is leviable on spirit or beer manufactured in any distillery, and "on payment made upon the issue of excisable article for sale from a warehouse". Here too retail sale is left out. The Provincial Excise Acts show

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that although there had been premia charged for leases of the right to sell, and licence fees made payable for carrying on business in excisable articles, there was no duty ever charged on actual sale of goods by retail. The reason is obvious. The excise Acts make private sales of excisable articles penal. No one can sell them without holding a lease or licence. That is why no tax is directly imposed on sales.

Opium, which had been a monopoly of the Government of India, was not a matter for Provincial legislation at all. But S. 5 of the Opium Act I of 1878 authorised Provincial Governments to frame rules relating to possession, transport, importation or exportation or sale of opium and the "form of duties leviable on the sale of opium by retail." When the Provinces themselves purchased opium from the Government of India factory at Ghazipur, they could not impose excise duties on their own purchases but would sell opium at a higher price, a part of the profit representing what they would have got as excise duty on first sales in other circumstances. It has not been shown to us that any duty had been actually imposed on the retail sales of opium. Unlike the Excise Acts, the duty imposed on opium was not even called in the Act an excise duty, but merely a duty. Excise duties on opium have now been expressly taken away from the Centre and specifically assigned to the Provinces. The fact that the Government of India has at present the sole monopoly of manufacture is an accident which cannot affect the interpretation of the words used.

Had there been in existence any Excise Act imposing duties on retail sales of motor spirits and lubricants, it might have been possible to contend that this type of duty, being in existence at the time that the Act was passed, must be regarded as a recognised type of excise duty, and hence should be specially included within the connotation of that term. In the absence of any such legislative practice, it cannot be seriously argued that a duty on retail sales was understood in 1935 to be an excise duty in India. At the same time the absence cannot conclusively prove the negative; otherwise in the absence of such practice neither the central nor the provincial Legislatures would have power to tax sales. In *Croft* v. *Dunphy*, there had been Hovering Acts which established the affirmation. In India the absence can only show that it was not in point of fact known that excise duty would include taxes on retail sales as well. The fact is that neither any Central nor Provincial Excise Act imposed a duty on retail sales, because apparently this post-War fiscal measure had not been introduced in India till 1935. The previous Legislative Practice can certainly not help the Centre

There is, of course, a remote *danger* that a Province may impose an almost prohibitive duty on the sale of articles, which are not produced within the Province nor are manufactured or produced in other Provinces of India, with the result that the sale of such articles would be almost prevented and the duty in such circumstances may amount to a restriction on imports of these articles. For example, if motor cars and radio sets are not manufactured in India, an extremely heavy duty on their sales may seriously handicap business dealings. In such cases, an imposition even after entry may be as effectual in the way of hampering commerce and

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trade as a direct import duty, unless the goods have become incorporated and mixed up with the mass of the property in the Province so as to be treated as part of the goods in existence at that time in that Province (*e.g.*, secondhand cars). If too wide an interpretation is put on words used in a section, there is always a danger of the bounds being over-stepped by mistake, even though not deliberately. But we have to trust that the Provinces would act fairly and reasonably, and should therefore not take any possible abuse into account. If the authority to legislate is clear, then the Act should not be held to be invalid merely because it may be feared that that authority may be abused in future Such extreme cases can be left to be dealt with by tribunals when they arise.

In the *Bank of Toronto* v. *Lambe*,[1-2] Lord Hobhouse, at p 586, remarked:

"It is suggested that the legislature may lay on taxes so heavy as to crush a bank out of existence. But it cannot be conceived that when Imperial Parliament conferred wide powers of local self-government on great countries, it intended to limit them on the speculation that they would be used in an inferior manner. People who are trusted with the great power of making laws for property and civil rights may well be trusted to levy taxes."

At p 587 his Lordship further remarked:

"If they find that on the due construction of the Act a legislative power falls within the section, it would be quite wrong of them to deny its existence because by some possibility it may be abused or may limit the range which otherwise would be open to the Dominion Parliament."

In *Attorney-General for Canada* v, *Attorney-General for Ontario*,[3] Lord Herschell said:

"The supreme legislative power in relation to any subject matter is always capable of abuse, but it is not to be assumed that it will be improperly used; if it is, the only remedy is an appeal to those by whom the Legislature is elected"

Again in *Brewers and Malsters Association of Ontario* v *Attorney-General for Ontario*,[4] Lord Herschell observed:

"It was argued that the provincial legislature might impose a tax of such an amount and so graduated that it must necessarily fall upon the consumer or customer, and that they might thus seek to raise a revenue by indirect taxation in spite of the restriction of their powers to the imposition of direct taxation. Such a case is conceivable. But if the Legislature were thus, under the guise of direct taxation, to seek to impose indirect taxation, nothing that their Lordships have decided or said in the present case would fetter any tribunal that might have to deal with such a case if it should ever arise."

We must therefore consider the Act as it stands, unperturbed by the possibility of any drastic consequences following if authority is held to be vested in any particular Legislature. Much less should our conclusion be affected by any consideration of the financial loss suffered by the Centre or the Provinces if one or the other view were to be accepted

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1-2. (1887) 12 A.C. 575.
3. (1898) A.C. 700 at 713.
4. (1897) A.C. 231 at 237.

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Nor am I able to apply the principle that where a particular power comes within both of two mutually exclusive jurisdictions, as in Canada, it should be regarded as an exception to the general rule. An exception falls within and not outside a general provision. The essence of the principle is that a particular exception restricts a general provision, although covered by it. In the Indian Constitution there is a definite provision in the case of an overlapping, and where such an overlapping is inevitable, the general power of the Centre would override even a particular power of a Province.

The Privy Council has held that an excise duty is a typical instance of indirect taxation, and that a tax on consumer or consumption is direct. Excise duties cannot therefore include taxes on consumption. Were I to hold that, I would feel compelled to go further and hold that the power of the Centre to tax consumption, if inclusive, would not admit of any exception in favour of the Provinces, but must prevail I do not think that the Provinces have any general power to impose taxes on consumers or on consumption, much less can such a power be derived from List II—48.

In *answering* the question referred to us three great principles laid down by their Lordships of the Privy Council must be borne in mind. The first is that "It will be wise to decide each case which arises, as best as they can without entering more largely upon an interpretation of the Statute than is necessary for the decision of the particular question in hand." (*Citizens Assurance Co.* v. *Parson* [5] In other words "The structure of (the sections), and the degree to which the connotation of the expressions overlaps, render it, in their Lordships' opinion, unwise on this or any other occasion to attempt exhaustive definitions of the meaning and scope of those expressions Such definitions, in the case of language used under the conditions in which a constitution such as that under consideration was framed, must almost certainly miscarry. It is in many cases only by confining decisions to concrete questions which have actually arisen in circumstances the whole of which are before the tribunal that injustice to future suitors can be avoided." (*John Deere Plow Co.* v. *Wharton.*[6] The second is that "That true test must, as always, be the actual language used .. .. The problems of the Constitution can only be solved as they emerge by giving effect to the language used." (*James* v. *Commonwealth of Australia.*[7] And the third is that we have to look to "the pith and substance" of the Act in order to ascertain its "true nature and character". 'If on the true view of the legislation it is found that in reality in pith and substance the legislation invades civil rights within the Province. .. .. .the legislation will be invalid" (*Attorney-General for Canada* v. *Attorney-General for Ontario.*[8]

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5. (1881-82) 7 A.C. 96 at 109.
6. (1915) A.C. 330 at 339-40.
7. (1936) A.C. 578 at 614-5.
8 (1937) A.C. 355 at 367.

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Without in any way attempting to give an exhaustive definition of "duties of excise," but giving to the words "taxes on the sale of goods" as used in the Provincial Legislative List entry No. 48 their ordinary and natural meaning and comparing them with the words "duties of excise on goods manufactured or produced in India" as used in Federal List, entry No. 45, my conclusion is that the tax on the retail sales to the consumers is in pith and substance not an excise duty, and that therefore the Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938, and all the provisions thereof are not *ultra vires* of the Legislature of the Central Provinces and Berar.

As this Reference was made with mutual consent, the parties should bear their own costs. The Advocates-General who on their own applications under O. 36, r. 2, F.C R. were permitted to appear and were heard, should also bear their own costs.

Jayakar, J.—The material facts connected with this Reference are stated in the opinion of the Chief Justice and I need not repeat them,

Cases of conflict between the jurisdiction of the Parliament of a Dominion and the provincial jurisdiction have frequently arisen before the Judicial Committee of the Privy Council and certain principles have been evolved as a result of the decisions of that Board. These will, I think, prove a useful guide to a proper elucidation of the question involved in this Reference and I shall, therefore, state, *seriatim,* such of them as appear to me to be applicable to the facts of this case:—

(1) That the provisions of an Act like the Government of India Act, 1935, should not be cut down by a narrow and technical construction, but, considering the magnitude of the subjects with which it purports to deal in very few words, should be given a large and liberal interpretation, so that the Central Government, to a great extent, but within certain fixed limits, may be mistress in her own house, as the Provinces, to a great extent, but again within certain fixed limits, are mistresses in theirs. See *Henrietta Muir Edwards and Others* v. *Attorney-General for Canada and Others.*[9]

(2) In an enquiry like the one before us in this Reference, the Court must ascertain the true nature and character of the challenged enactment, its pith and substance; and not the form alone which it may have assumed under the hand of the draftsman. See *Attorney-General for Ontario* v. *Reciprocal Insurers and Others.*[10]

(3) Where there is an absolute jurisdiction vested in a Legislature, the laws promulgated by it must take effect according to the proper construction of the language in which they are expressed. But where the law-making authority is of a limited or qualified character, obviously it may be necessary to examine, with some strictness, the substance of the legislation, for the purpose of determining what it is that the Legislature is really doing. See *Attorney-General for Ontario* v *Reciprocal Insurers and Others.*[10]

(4) Even where there has been an endeavour to give pre-eminence to the Central Legislature in cases of a conflict of powers, it is obvious that, in some cases

9. (1930) A.C. 124, at 136, 137.
10. (1924) A.C. 328 at 337.

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where this apparent conflict exists, the Legislature could not have intended that powers exclusively assigned to the Provincial Legislature should be absorbed in those given to the Central Legislature. "It is the duty of the Courts, however difficult it may be, to ascertain in what degree, and to what extent, authority to deal with matters falling within these classes of subjects (mentioned in the Central and Provincial Lists) exists in each legislature and to define, in the particular case before them, the limits of their respective powers. It could not have been the intention that a conflict should exist; and in order to prevent such a result, the two sections must be read together, and the language of one interpreted, and, where necessary, modified by that of the other. In this way, it may, in most cases, be found possible to arrive at a reasonable and practical construction of the language of the sections so as to reconcile the respective powers they contain and give effect to all of them. In performing this difficult duty, it will be a wise course for those on whom it is thrown to decide each case which arises as best they can, without entering more largely upon an interpretation of the statute than is necessary for the decisions of the particular question in hand " See *The Citizens Insurance Company of Canada* v *Parsons, etc* [11-12]

(5) "In the interpretation of a completely self-governing Constitution founded upon a written organic instrument (such as the Government of India Act of 1935) if the text is explicit, the text is conclusive, alike in what it directs and what it forbids. When the text is ambiguous, as, for example, when the words establishing two mutually exclusive jurisdictions are wide enough to bring a particular power within either, recourse must be had to the context and scheme of the Act." See *Attorney-General for Ontario* v. *Attorney-General for Canada*.[13]

The material items in this case are item 45 in List I (the Federal Legislative List) and item 48 in List II (the Provincial Legislative List). Item 45 (List I) is as follows:—

"Duties of excise on tobacco and other goods manufactured or produced in India except—

(a) alcoholic liquors for human consumption;

(b) opium, Indian hemp and other narcotic drugs and narcotics, non-narcotic drugs;

(c) medicinal and toilet preparations containing alcohol, or any substance included in sub-paragraph (b) of this entry."

Item 48 (List II) is as follows:—

"Taxes on the sale of goods and on advertisements".

It may be mentioned, in this connection, that the commodities excepted in item 45, as stated above, are mentioned in item 40 of List II, which is as follows:—

"Duties of excise on the following goods manufactured or produced in the Province and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India:—

(a) alcoholic liquors for human consumption;

(b) opium, Indian hemp and other narcotic drugs and narcotics; non-narcotic drugs;

(c) medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry."

In what category does the tax levied by the Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938 (herein-

11-12 (1881) 7 A.C. 96 at 108, 109.

13. (1912) A.C. 571, 583.

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after briefly called the Central Provinces Act) fall? Does it fall under item 45 (List I) as a "duty of excise"? Does it, on the other hand, fall under item 48 (List II) as a tax on the sale of goods? Does the Act or any and what portion of it fall under both items? If so, to what extent is there an overlap and to whom does it go—the Centre or the Provinces? These are the main questions before us A subsidiary question was argued; that in the event of the tax levied by S. 3 of the Central Provinces Act being invalid with reference to motor spirit and lubricants manufactured or produced in India, is it not invalid also with reference to the same commodities manufactured out of India, under the provisions against discrimination in S 297 (1) (*b*) of the Government of India Act, 1935? The last question I propose to leave out of consideration for the present

The material provision of the Central Provinces Act is S. 3 which enacts that:

"There shall be levied and collected from every retail dealer a tax on the retail sales of motor spirit and lubricants at the rate of five per cent. on the value of such sales."

"Lubricant" is defined in S. 2 (*b*) as meaning *any* form of oil, grease or other lubricating substance ordinarily used for lubricating the internal machinery of motor vehicles. "Motor spirit" is defined in S. 2 (*c*) as meaning *any* inflammable hydrocarbon. . . . . . .which is ordinarily used for providing reasonably efficient motive power for any form of motor vehicle. "Retail dealer" is defined in S. 2 (*e*) as meaning any person who, on commission or otherwise, sells, or keeps for sale, motor spirit or lubricant *for the purpose of consumption* by the person by whom or on whose behalf it is or may be purchased. "Retail sale" is defined in S. 2 (*f*) as meaning a sale by a retail dealer of motor spirit or lubricant to a person *for the purpose of consumption* by the person by whom or in whose behalf it is or may be purchased (The italics are mine).

It is clear that the tax in question is a tax *on consumption within the Province as shown by the retail sales,* or, as it may be otherwise stated, a tax on retail sales to persons who purchase for the purpose of such consumption within the Province. The tax is in no way connected with the production or manufacture of the commodities and is irrespective of their origin or seat of manufacture or production It is levied on the commodities merely as existing articles of trade and commerce, circulating and consumed within the limits of the Province. Thus analysed, the tax appears to fall within the well-known category of an "indirect tax" in so far as it is intended to be or capable of being passed on to the consumer by an advance in prices corresponding more or less to the amount of the tax. Though this distinction is not directly relevant to the question before us, it may be useful to consider what its nature is in the well-known dichotomy "of direct" and "indirect" taxes, as defined by the Privy Council who observe, in *Attorney-General for British Columbia* v. *Kingcome Navigation Co.*,[14] that a direct tax is one demanded from a person who it is intended

14. (1934) A.C. 45 at 53.

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or desired should pay it. An indirect tax is one demanded from one person, in the expectation and intention that he shall indemnify himself at the expense of another, such as customs and excise taxes are.

The first question, therefore, is what does the expression "duties of excise" in item 45 (List I) mean? The method which I propose to follow in the elucidation of the question before us is first to ascertain the meaning of the expression "duties of excise" in that item, taken by itself and apart from item 48 in List II, and then to ascertain how far it is necessary to cut down or modify this meaning in order to reconcile that item with item 48 (List II), if there appears to be a conflict between the two For, it is clear that, according to the rule of interpretation No. (4) which I have stated in the beginning of this opinion, it is the duty of this Court to make every endeavour to reconcile the two items and to avoid a conflict between them as far as possible: to give a meaning to both of them and to construe them in such a way as to avoid making the one or other of them unmeaning, superfluous or nugatory. As both sides have addressed us a detailed argument on this question, I shall discuss it in some detail.

The contention of the Government of India is that the expression "duties of excise" in item 45 (List I) means an *indirect tax on the consumption* of indigenous goods, levied and collected at *any* stage between their production and manufacture on the one hand and the time when they reach the consumer, on the other. Fortunately, we are not here troubled with the distinction, observed in some cases, between a "duty" and a "tax", for according to S. 311 of the Government of India Act, 1935, "taxation" includes the imposition of any tax, whether general or local or special, and "tax" shall be construed accordingly.

The Advocate-General of the Central Provinces, on the other hand, defines an "excise duty" in item 45 (List I) as a tax *on the manufacture and production* of indigenous goods, which can be levied *up to,* but not inclusive of, the stage of their *first* sale, and that a tax levied from and after that stage cannot be an "excise duty". The Advocate-General of Madras, when he at a later stage came in to reinforce the Central Provinces Government's argument, admitted that the Australian cases, which he cited in the course of his able argument, went further and included in the term "excise duties" taxes levied *on* or at the time of the *first* sale. As will appear from my later remarks, this difference in the argument of the two counsel is not material in the view I take of the expression "duties of excise" occurring in item 45 (List I).

The question, therefore, is what is the meaning of the expression "duties of excise" in item 45 (List I) taken by itself and apart from item 48 (List II)? What strikes one at first sight is the fact that item 45 occurs immediately after "duties of customs, including export duties" in item 44 (List I). From this juxtaposition, it may be fairly inferred that duties of excise in item 45 are co-extensive with "customs" duties in item 44 as a co-ordinate source of Central revenues. The next thing that is to be remarked is the fact that the words "duties of excise" occur in item 45 of List I and also in item 40 of List II. A strong argument was advanced at the bar,

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notably by the Advocate-General of Madras, that if the Act furnishes its own glossary, it is our duty to accept it. If so, it is not unfair to infer that the expression "duties of excise" has the same meaning in both the items, namely, item 45 in List I and item 40 in List II. Is it, therefore, possible to find out, with any degree of clearness, what the words "duties of excise" were intended to mean in item 40 (List II)? Did they include taxes levied on goods manufactured or produced in the Province *at any stage* inclusive of their sale to the consumer or were those words confined only to taxes levied *on and at the time* of their manufacture or production, or up to their first sale, as is argued on behalf of the Provinces?

Some light is thrown on this matter by item 16 occurring in the List of Provincial subjects given in Schedule I of the Devolution Rules made under S. 45-A of the previous Government of India Act, 1919. That item reads as follows:—

"16. Excise, that is to say, the control of *production, manufacture, possession, transport, purchase, and sale* of alcoholic liquor and intoxicating drugs, and the levying of excise duties and licence fees on or in relation to such articles, etc." (The italics are mine.)

It appears from this that, taking this item as the background of the Government of India Act, 1935, as we are entitled to do, it could be urged with fairness that the word "excise" meant and included, in the said item 16, the "control" of the excisable commodity (alcoholic liquor, etc.) from the stage of production and manufacture up to sale. The first part of this clause may relate only to the *administrative* power of control of the Provincial Government over the several stages from manufacture up to sale of the said commodity. Then follow the words "the levying of excise duties . . . . . . on or in relation to such articles", that is, alcoholic liquor and intoxicating drugs. This part of the clause clearly relates to the power of the Provincial *Legislature* to "levy excise duties" on the same commodity. It would not be unfair to infer, from this juxtaposition, that the power of control enjoyed by the Provincial administration under the first part of the item is co-extensive with the power enjoyed by the Legislature of the same Province of levying excise duties mentioned in the second half of the item. For, it could hardly have been intended that the power of control of the Provincial Government was to be of a different range from their legislative power of "levying excise duties" on the same commodity. On a proper interpretation of this item, therefore, the conclusion seems to me inevitable that the Provincial Legislature's power, under this item, of "levying excise duties" could be exercised, "on or in relation to" the excisable commodity, at any stage commencing with manufacture and production and going on to "sale", through the several intermediate stages mentioned in the item.

It should be further noted that item 16 in Schedule I of the Devolution Rules is now split up in the new Act of 1935 into two items, namely, items 31 and 40 in the Provincial Legislative List, and these two items read with the provisions of S. 100 (3) of the Act suggest the conclusion that, under its provisions, the power of the Provincial Legislature to make laws must be the same in respect of matters included in items 31 and 40 in List II.

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They both appear in the same List and the legislative power of the Province is derived, equally in both cases, from the same sub-section [sub-S. (3) of S 100]. It is clear, therefore, that the said legislative power must be the same in both cases. And it is but rational that it should be so, because very often the "control" of production, manufacture, possession, transport, purchase and sale of an excisable commodity in a Province can be exercised most effectively through the medium of an excise duty levied by the Provincial Legislature. A tax is very often an effective means of "controlling" production, manufacture, possession, transport; purchase and sale of an excisable commodity.

It is not difficult to imagine a case which may sometimes arise; *e.g.*, "prohibition" of intoxicating liquors, which some Provincial Governments have now introduced in India, may exist in one locality and may not exist in another and contiguous locality. This may, in certain cases, necessitate the "control" of "transport", etc., of the goods from one locality to the other, and, in that event, an effective way of exercising such "control" may be the levying of an excise duty upon entry into or consumption of the excised article in the prohibited area.

I, therefore, see no justification for interpreting the two items (items 31 and 40 in List II) in such a way as to give a different range of powers to the two departments of a Provincial Government, both dealing with the same commodity; one through the medium of administrative control and the other by taxation.

I see no escape from the conclusion that the term "excise duties" in the latter half of item 16 of the Devolution Rules and also the expression "duties of excise" in item 40 (List II) of the present Act bear a wide signification, and include all duties levied on the consumption of the excisable commodity in the Province at any stage from production to sale. If this is so, I see no reason for withholding from that term the same signification in item 45 (List I), taking that item as if it stood by itself and item 48 (List II) did not exist.

There is no definition of the words "excise duty" in the Act and one has, therefore, to find out its meaning from such indications as the above, which the Act itself provides, or from the definitions of that term occurring in recognised text books, or from circumstances throwing light on what the Legislature had in mind at the time of passing the Act. I have already commented upon the glossary which the Act itself provides, and I proceed now to the definitions given by text book writers.

Stephen, in his Commentaries on the Laws of England, 1928 edition, Volume IV, p. 420, following Blackstone, says:—

"Excise duties are those duties which are imposed by Parliament upon commodities produced and consumed in this country. They are directly opposite in their nature to the customs duties, for they are an inland imposition paid sometimes on the consumption of the commodity, frequently upon the retail sale."

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Similarly, Judge Story, in his work on the Constitution of the United States, Fifth Edition, Volume I, S. 953, adopts almost identically the same definition:

"An inland imposition paid sometimes upon the consumption of the commodity or frequently upon the retail sale, which is the last stage before consumption."

Palgrave, in his Dictionary of Political Economy, states:—

"Excise is the name given collectively to those duties which, in the fiscal system of the United Kingdom, are levied upon commodities produced within the Kingdom itself, as distinguished from customs duties which are levied at the ports upon commodities imported from abroad. The word 'excise' (Latin *excido*) signifies etymologically something cut off; as an excise duty may in effect be considered something cut off or deducted, for the benefit of the State, from the price of the article as paid by the consumer. If there were no duty, the consumer would pay a lower price for the article. The price, therefore, that he actually pays includes the duty; whence it follows that the duty itself is something deducted or subtracted from the actual price paid. The price, in fact is divided into two parts, one part being subtracted from the whole for the benefit of the State and the remainder going to the vendor."

This is the sense in which the word "excise" has been understood for many years in England and the question arises whether there is any reason why this meaning should, in the Government of India Act, 1935, be so cut down as to exclude duties charged and levied at some stage subsequent to their manufacture and production, *e.g.*, at or in connection with a sale to a consumer. It was argued that the definitions of text book writers on political economy, however eminent, prove hardly a valuable guide in legal matters, but an answer to this contention is provided by several rulings of the Privy Council, who, in a series of decisions going back to 1878, have accepted Mill's definition of a "direct taxation" and "indirect taxation" (*See* these cases referred to in *Attorney-General for British Columbia* v. *Kingcome Navigation Co.*[14-16]) Their Lordships' view appears to be that the definitions given by eminent text book writers like Mill have a value even in the elucidation of legal questions, because such definitions embody the common understanding of those who knew the subject and were, therefore, to that extent, likely to have been present to the minds of those who passed the Federation Act.

The answer of the Provinces to the definition of "excise duties", as given above, is as follows: in item 45 (List I) the words show that the duty mentioned in it is *on* manufacture or production. I, find some difficulty in accepting this contention, for looking only to the words of item 45, the duty is *on* the *goods* and the words "manufactured or produced in India" are descriptive of the goods only. In the corresponding item 40 in List II. the same grouping appears, namely, duties *on goods* manufactured or produced in the Province. Relying, therefore, on the words only, it is clear that the duty is not "on" the "manufacture or production", but "on" the "goods" manufactured or produced.

The words "manufactured or produced" in item 45 (List I) are descriptive of the goods and are not mentioned as the basis of incidence. They also

15-16. (1934) A.C. 45 at 51 to 53.

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occur, as said above, in item 40 of List II where, too, they are descriptive of the goods as in item 45 (List I), the only difference between the two items being that under item 45 the "manufacture or production" is in the whole of India, whereas under item 40 it is "in the Province". It further appears, from the juxtaposition of item 44 in List I, "duties of customs", with item 45, that the words "manufactured or produced in India" in item 45 have a significance as marking a contrast to the "customs" in item 44 which relate to goods coming from outside India. This juxtaposition of the duties of customs in item 44 is, in my opinion, not without significance. For, on a careful perusal of the provisions of the several Constitutions relating to countries which form a part of the British Commonwealth of Nations, one finds that "customs" and "excise duties" are generally grouped together and their imposition placed within the exclusive competence of the Dominion Parliament. *See,* for instance, S. 122 of the British North America Act, 1867. This grouping in that Act is explained by the Privy Council as no doubt due to the fact that the effect of such duties is not confined to the place where, and the persons upon whom, they are levied. *Attorney-General for British Columbia* v. *McDonald Murphy Lumber Co., Ltd.*[17]

It is further to be noted that in neither of the items (45 in List I and 40 in List II) occur the words 'in respect of' manufacture or production, though the Legislature has used this expression in some items, for instance in item 56 of List I and in item 43 of List II. If the intention of the Legislature was to place the incidence of the duty of excise "on the manufacture or production" we would have expected the said expressions to occur in the section or some equivalent words indicating clearly that the incidence was either "on" or "in respect of" production or manufacture. On the contrary, the words are duties "on" the "goods" indicating thereby that the duty arose in connection with the goods and followed them through the several stages of their progress to the consumer and was not limited to the stage of their manufacture or production. An instance of an excise duty pursuing a commodity through several stages, for instance. of increase, decrease or remission, is to be found in S. 10 of the Indian Tariff Act, 1934.

If it is pertinent to refer to the draft item which was historically the predecessor of item 45 (List I) before the Joint Committee on Indian Constitutional Reforms, 1933-34 and I think it is permissible to do so, as it is a part of the history of the legislation), I may state that the item, in the form in which it was placed before the Committee, was worded as follows: "Duties of excise on the manufacture and production of tobacco and other articles", etc. The wording of this draft was subsequently changed to its present form, and it is not unfair to infer that the alteration was made in order to include in item 45 all duties *on* the goods (provided that they were duties of excise and the goods were manufactured or produced in India) and not only those which were levied at the stage of their manufacture or production.

And this, in my opinion, is as it shoud be, for if the proper import of an "excise duty" is that it is a tax on consumption, there is no reason why

17. (1930) A.C. 357 at 364.

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the State should not have power to levy and collect it at any stage before consumption, namely, from the time the commodity is produced or manufactured up to the time it reaches the consumer. I will presently refer to certain authorities in support of the view that a duty of excise is essentially a tax on consumption, but apart from it, I see no rational ground for limiting the right of a State to levy an excise duty at any time it chooses before the commodity reaches the consumer. Admittedly the necessity of levying such a tax depends upon the exigencies of the State, the nature of the commodity and the expediency of excising it at any particular stage which is found convenient according to circumstances. It may be that, in most cases, a State may find it expedient to levy and collect the duty at the stage of manufacture or production or while it is in bond or is released thereout for sale. These are all questions of detail which a State should be left free to decide, according to its convenience and necessities; and I confess I find it difficult to evolve any rational principle, distinguishing an excise from a non-excise, based upon the accident or expediency that, in a particular case, a State charges the duty at the stage of production, manufacture, transport or sale. I do not see any reason for limiting the taxing power of the State to any of these earlier stages. If it is a tax on consumption, there is no reason why it should not be levied and collected at any of the stages between manufacture or production on the one hand and sale to the consumer on the other, which the State may find convenient according to circumstances.

I may here invite attention to an important American ruling, *Patton* v. *Brady*[18]. Although American rulings may not be binding on this Court, I see no reason for not accepting, with respectful caution, any help they can give in the elucidation of questions which arise before this Court. This case is important, because it arose under a Constitution in which there was no entry like item 48 (List II) and consequently the term "excise tax" received its proper interpretation without the necessity of cutting it down in order to reconcile it with an item like 48 (List II). The plaintiff had purchased, in open market, a quantity of tobacco in May 1898; all requisites for completing the purchase which were required by the Act then under operation were satisfied; the price was paid, documents executed, goods removed and the entire tax due on them under the Act then current was paid. In the next month, in June, 1898, before the goods were consumed or exported, the Congress imposed a fresh tax on tobacco to meet war expenditure, and, under S. 3 of the new Act, an increased taxation was placed on all tobacco manufactured, sold and removed before the Act. This tax was said to be in lieu of the previous tax. Brady, the Collector of Internal Revenue, demanded the new tax, in addition to what had been paid only a month before on the entire quantity of the tobacco. The fresh tax was paid by the plaintiff under protest, and, later an action was brought, asking for its refund, on the ground that the charging S. 3 under which the tax was levied was invalid and that the tax was not an excise.

Brewer, J., went into the nature of the tax and defined an "excise tax" in terms which I find no difficulty in accepting. After going through several

18. (1901) 183-186 U S Supreme Court Reports.

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authorities he defines "excise" as a tax on an article indigenously manufactured for consumption and imposed at a period intermediate the commencement of manufacture, and the final consumption of the article. This, he says, was the meaning of the word, as understood in England at the time the Act was framed and he saw no necessity for giving the word a different meaning.

He then goes into the question, which was also suggested by the Provincial Advocates-General in their argument before us, that as the Government of India, in this particular case, have once taxed the motor spirit which is the subject-matter of the sale in S. 3 of the Central Provinces Act, their power to levy taxation on the same commodity is exhausted and, consequently, all such revenue, as is raised in the Province by a subsequent taxation of the same commodity, must belong to the Province. Dealing with this doctrine of the "power being exhausted", Brewer, J., makes some opposite observations which will bear quoting:

"Why should the power of imposing an excise tax be exhausted when once exercised? It must be remembered that taxes are not debts in the sense that, having once been established and paid, all further liability of the individual to the Government has ceased. They are, as said Cooley on Taxation, page 1: 'The enforced proportional contribution of persons and property levied by the authority of the State for the support of the Government and for all public needs'. And so long as there exist public needs, just so long exists the liability of the individual to contribute thereto. The obligation of the individual to the State is continuous and proportioned to the extent of the public wants. No human wisdom can always foresee what may be the exigencies of the future, or determine in advance exactly what the Government must have, in order to provide for the common defence and promote the general welfare. Emergencies may arise; wars may come unexpectedly; large demands upon the public may spring into being with little forewarning; and can it be that, having made provision for times of peace and quiet, the Government is powerless to make a further call upon its citizens for the contributions necessary for unexpected exigencies?"

It was urged before us that in interpreting the words "duties of excise" in the Government of India Act, 1935, regard should be had to the legislative practices of the Central and Provincial Governments which prevailed previously and up to the passing of that Act. I doubt, in the first place, whether this will be a good rule of interpretation, but, apart from it, I think that whatever utility such legislative practices may have in the case of other Constitutions enacted under different circumstances, it is considerably weakened by the fact that the Government of India Act, 1935, is not so intimately connected with its predecessors, by the nature of the Constitution which it establishes, as to receive much guidance from legislative practices operative during the time of its predecessors. As is well-known, the Government of India Acts previously to 1935 were all enacted as parts or instalments of an evolutionary or progressive scheme of unitary Government, under which the Government of India were supreme, except in such administrative and legislative matters as were given to the Provinces by devolution. The residuary powers mostly remained with the Government of India, which had the ultimate power of control and Superintendence over Provincial Governments. This scheme of things was radically altered by the Act of 1935, which, in effect, replaced the previous unitary government by a form of

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Federal Government, under which it could not be said, as previously, that the Government of India had supreme control or superintendence, etc., over Provincial Governments. By the Act of 1935 the fields of the two Governments were demarcated and made distinct Each was to be mistress in her own affairs. I doubt, therefore, whether the legislative practices of the previous times can furnish any decisive clue to the interpretation of a term forming part of the new Constitution.

Assuming, however, that such legislative practices could be useful, I am doubtful whether they are of such a clear and unequivocal character as to compel an inference helpful in the matter of interpreting the new Act. Our attention in this connection was called to Provincial Acts like Bombay Act, V of 1878, Bengal Act, V of 1909, Punjab Act, I of 1914 and U.P. Act. IV of 1910. These are all Excise Acts relating to the charging of duties upon several excisable products. What is noteworthy is that in none of these Acts, so far as I have been able to discover, the word "excise" is defined. All that these Acts can show is the fact that, in those particular instances, the several duties of excise were levied and collected at the stage of manufacture or production or at a subsequent stage previous to actual sale to the consumer. For instance, in the Bombay Abkari Act, V of 1878, S. 19-A (*a*), the duty was levied and collected on "issue for sale"; in the Bengal Act, S. 27, on goods imported, exported, transported, etc., and so on.

Coming to Central Acts, the following instances were quoted to us:

The Cotton Duties Act, II of 1896.
The Motor Spirit (Duties) Act, II of 1917.
The Sugar (Excise Duty) Act, XIV of 1934.
The Iron and Steel Duties Act, XXXI of 1934.

It was argued on behalf of the Central Provinces Government and of the Provinces generally that in none of these Acts the Central Legislature levied an excise at the stage of "sale" of the respective excisable commodities. For instance, it is pointed out that in the case of the Cotton Duties Act, under S. 6. the cotton "produced" in the mills is taxed. Under S. 3 (1) of the Motor Spirit (Duties) Act, the duty is levied and collected at every manufactory on all motor spirit "produced in such manufactory". In the Sugar (Excise Duty) Act, S. 3 (1), the duty is levied on "all sugar produced in any factory in British India" and either "issued" out of or "used" within such factory, according to the terms of the section. Under the Iron and Steel Duties Act, S. 4, the duty is levied, at a certain rate mentioned in the section, "on all steel ingots produced in British India" after the commencement of that Act and "shall be payable by the manufacturer thereof".

After carefully considering this argument, I am inclined to hold that the mode in which the several duties have been charged under the various sections of these Acts cannot be regarded as furnishing a glossary of the word "excise" as used in the new Act. To me, these several modes merely indicate that, having regard to the exigencies of the State in the days of the passing of those Acts and having regard also to the nature of the commodity, the mode of its manufacture, consumption, and transport, and also the possibility of the evasion of the tax, the Legislature thought, in these several

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instances, that the most effective way of levying and collecting the duty, so as to protect the fiscal interests of the State, was to charge it at the several initial sages mentioned in the said Acts. I am not inclined to attach a greater significance to the modes of charging under these Acts nor to construe them as limiting the right of the new Federal Government, established for the first time under the Act of 1935, to charge any duties, which could be shown *aliunde* to be included within the words defining their powers of taxation under the new Act.

A State levies taxes for public needs and the obligation of the individual to the State is proportioned to the extent of the public wants which can never be foreseen or anticipated. Speaking for myself, therefore, I would be unwilling, from equivocal considerations like the above, to limit the powers of the State, whether it is the Federal or a Provincial administration, which it enjoyed under the respective provisions relating to its powers of taxation. It would be, in my opinion, incorrect to interpret the *new* powers of the several Governments, merely by a reference to what the legislative practice was previous to the passing of the new Act. If "excise" means and includes a tax on goods manufactured or produced in the country and if I am right in saying that it is ultimately a tax on consumption and can be levied at any stage from manufacture to consumption according to the exigencies of the stage and the nature and consumption of the article, I cannot see why the word "excise". as understood in this way, should receive a limited signification by reason of the mere circumstance that, at some previous stages and under a form of Government entirely different from the present one (when perhaps the resources) of the Central Government were more numerous or more easily recoverable) the State thought it expedient in particular instances to levy and collect an excise duty at an early stage like manufacture, production or transport. I would require a stronger proof than the mere so-called legislative practices to induce me to deprive the words "excise duties" of a signification which they had and still have in England and in important parts of the British Commonwealth of Nations.

It is argued that the expression "excise duties" is understood in England in the widest signification, but that the expression has received a restricted meaning elsewhere in the British Commonwealth. I am well aware of this circumstance, but find that the alleged restriction of meaning amounts only to a rejection of taxes like a licence tax, dog tax, etc.

I now turn to the definition of "excise" duties to be found in more recent works.

In "Constitutional Law of the United States" by Hugh Evander Willis (1936 edition, p. 372), "excise" is defined as "an inland tax laid upon the manufacture, sale, or consumption of commodities within a country".

In the "Encyclopædia of the Social Sciences" edited by Edwin R.A. Seligman, Vol. V, p. 669, the following observations occur:

"Excise is a tax on commodities of domestic manufacture levied either at some stage of production or before the sale to home consumers".

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In commenting on the power of the State to levy an excise tax at any convenient stage according to the requirements of the case, the editors say (p. 670):

"The excise tax may be levied on the raw material or the finished article or it may attach to an intermediate stage of the production . . . . process . . . a raw material tax is disadvantageous to producers inasmuch as it is collected at the very beginning of the production process, long before the manufacturer has the opportunity to recover it by selling the finished product. . . The manufacturer may also resort to storing the goods in bonded warehouses, thus postponing the payment of the tax until the commodities are withdrawn for sale."

Mr. Findlay Shirras, in his "Science of Public Finance", Vol. II (3rd Edn.), states (p. 654):

"Excises or taxes on commodities of domestic manufacture may be levied on the raw materials or at an intermediate stage of their production or when the articles are ready for consumption. . . . *The taxes should be levied in accordance with the canon of convenience.*"

He further observes that in recent years new excises have been discovered, for instance, on petroleum or gasoline which many countries have now adopted. (The italics are mine.)

These are quotations from recent authors and they make clear *inter alia* that the stage at which an excise tax is levied and collected is a matter dependent on the nature of the commodity and the facility of collecting the tax. It is not a vital element affecting the nature of the tax as an excise.

For all these reasons I hold the view that if item 45 (List I) had stood by itself and item 48 did not exist in the Provincial List and consequently no necessity arose to reconcile the two items, the expression "duties of excise" occurring in item 45 (List I) would include all duties of excise on goods manufactured or produced in India, whether levied or collected at the stage of manufacture or production or at any of the subsequent stages up to consumption, and that the Central Legislature had, under that item, taken along with S. 100 (1), the exclusive power to make laws with respect to the levying of all such duties.

The next question is whether the wide meaning I have attached to the expression in item 45 (List I) has in any and what way to be curtailed or modified, so as to reconcile that item with item 48 in List II. Item 48 is "taxes on the sale of goods". The wording is as clear and precise as it can be. There is no doubt that the item was intended to be operative. The rule of interpretation No. (5), which I have stated above, applies, that where the text is explicit, the text is conclusive in what it directs and what it forbids. The language of item 48 (List II) has to be given effect to. Its plain and natural meaning would be a tax on the sale of goods, and the term "goods", according to its interpretation in S. 311 of the Government of India Act, 1935, would include "all materials, commodities and articles." These would necessarily include goods mentioned in item 45 (List I). Item 45, taken by itself, would, as I have shown above, include all duties from production up to and inclusive of "sale". Item 48 (List II) would include all taxes on the "sale" of the same goods. There will thus be a conflict and unless it is removed by a proper reconciliation between the two, item 45

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(List I) would practically absorb item 48 (List II) and render it completely nugatory. Consequently, an interpretation has to be placed upon the two items which must conform with the presumption that Parliament could not have intended that the powers exclusively assigned to the Provincial Legislature under item 48 (List II) should be absorbed in those given to the Central Legislature in item 45 (List I). The item, therefore, has to be reconciled with item 48 and the reconciliation must be such as will not do violence to the words contained in the item. It could not have been the intention of the Legislature that a conflict should exist between that item and item 45, and, in order to prevent such a result, the two items must be read together and the language of the one interpreted, and, where necessary, modified by that of the other. I will add that the reconciliation to be made between the two items as stated in this paragraph is irrespective of the provisions of the *non-obstante* clause in S. 100 which, as pointed out by the Chief Justice in his opinion, does not come into operation except in the last resort.

Item 48 (List II) is entirely a new item and did not occur in the classification of Central and Provincial subjects which found a place in the earlier Acts relating to the Government of India. Another circumstance of equal significance is the fact that a similar item does not find a place in the Constitutions relating to other parts of the British Commonwealth of Nations which were framed before the Great War. The item, therefore, has, in all probability, reference to conditions which arose since then and it is not unlikely that this item was inserted in List II and allocated to the Provinces, because recent experiences of economists in other parts of the world led to a realization that a tax on the sale of goods was a prolific source of revenue.

On scanning Lists I and II with a view to discover what sources of revenue have been left respectively in the hands of the two Governments, Central and Provincial, it will be found that an attempt has been made, as far as possible, to clearly mark out the field of each, and to avoid the possibility of a conflict or overlap. If that is the general intention of the Legislature to be gathered from the tenor of the two Lists, it will be fair to interpret the two items in such a way as would avoid conflict and keep them out of the purview of each other.

On a careful review of the whole question, I am therefore inclined to hold that Parliament intended:—

(1) That, as regards goods centrally excisable, taxes on their sale within the Province for purposes of consumption, when such taxes are in no way connected with their production, manufacture, etc., within the Province but are imposed on their sale in the Province merely as existing articles of trade and commerce, should be exclusively within the competence of the Provincial Legislature.

(2) That, save as aforesaid, all duties of excise on those goods, whether levied and collected at the stage of manufacture, production or any subsequent stage up to consumption (exclusive of sale in the Province, as stated above), should remain exclusively within the competence of the Centre, A corollary of this rule will be that the residuary powers, if any

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of levying and collecting excise duties on those goods (save on their sales as aforesaid) will remain exclusively within the competence of the Central Legislature.

I am further fortified in this view by the juxtaposition of items 48, 49 and 50 (List II). On reading them together, it appears that the intention of the Legislature was that taxes on consumption of excisable goods within a Province, even when such goods fell under item 45 (List I), should be given exclusively to the Provinces. Item 49 (List II) is particularly significant and throws light on item 48 (List II). It relates to "cesses on the entry of goods into a local area for consumption, use or sale therein". The word "goods" in that item includes, under S. 311 of the Government of India Act, 1935, all materials, commodities and articles. The expression is therefore wide enough to include goods which fall under item 45 of List I. If so, "cesses" on commodities ordinarily excisable by the Centre under item 45 (List I) would be within the exclusive competence of the Provincial Legislature, if levied on the entry of the goods into the local area for the purpose of consumption, use or sale therein. Similarly, item 50 (List II) relates to "taxes on luxuries". These "luxuries" may be excisable under item 45 (List I); yet, being objects of consumption within the Province, they appear to have been taken out of the purview of item 45 (List I) and allocated to the Provinces. It is not, therefore, unfair to infer from this grouping that the scheme of taxation was intended to be that an excisable commodity is subject to the legislation of the Centre in respect of all taxes on or connected with its production, manufacture, etc., etc., but when such commodity enters the precincts of a Province and a tax has to be imposed on its sale within the Province for purposes of consumption therein and the tax is in no way connected with its production, etc., but is imposed with respect to its sale merely as an existing article of trade and commerce, the power to do so is exclusively with the Province. I may here refer to a case where goods excisable by the Centre were held to be exclusively taxable by the Province in cases where their sale took place in the Province merely as existing articles of trade and commerce and the sale was in no way connected with their production or manufacture within the Province. See *The commonwealth and Commonwealth Oil Refineries, Ltd.* v. *South Australia*.[19])

This, I think, is an interpretation which is reasonable in itself and in keeping with the wording of the item and also of its context and the general scheme of the Act. In other words, as I interpret the two items, item 45 (List I) may be said to contain a general power to levy an excise duty at all stages. As an exception to this, a portion of the power is cut out and allocated to the Provinces under item 48 (List II). It operates as an exception to the general power conferred by item 45. I will invite, in this connection, attention to a ruling where a similar principle of reconciliation was adopted. *See* In the matter of *a Reference to the Supreme Court of Canada of certain questions concerning Marriage*[20]. In that case a conflict arose between two entries, one in the Dominion List entitled "marriage

19. 38 Com. Law Rep. 408 at 426.

20. (1912) A.C. 880 at 885-887.

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and divorce" and the other in the Provincial List entitled "solemnization of marriage in the Province". The Privy Council reconciled the conflict between these two, by holding that the exclusive power conferred on the Provincial Legislature to make laws relating to the solemnization of a marriage in the Province operated by way of exception to the exclusive jurisdiction as to its validity conferred upon the Dominion Parliament.

It is difficult to accept the contention of the Advocate-General of India that the expression "tax on the sale of goods" in item 48 (List II) means only a turnover tax and nothing more. Assuming, as he contends, that a tax on the sale of goods is only another expression for a "sales tax" which became popular after the War, there is authority for the view that "sales taxes" include turnover taxes and something more. It is difficult to understand why, if Parliament intended only turnover taxes to be included in item 48, they did not use that expression, which was certainly clearer than the somewhat inappropriate formula "taxes on the sale of goods". The interpretation of item 48 (List II), at which I have arrived independently, may receive some support from the wording of the draft of item 48 as it appeared in the White Paper and before the Joint Committee on Indian Constitutional Reform (1933-34). (*See* item 10 at page 118 of the "Proposals for Indian Constitutional Reform" presented to Parliament in March, 1933, and *see also* page 158 of Vol. I, Part I, of the Report of the Committee.)

This interpretation of item 48 (List II) will, I think, give a definite and clear field of taxation to the Provinces and another field, equally clear and definite, to the Centre, and thus the possibilities of conflict will be removed.

A powerful appeal was made to us by the Advocates-General of the Provinces that, consistently with its terminology, we should so interpret item 48 (List II) as to give it a content sufficiently extensive for the growing needs of the Provinces. It was argued that provincial autonomy granted by the new scheme of Government would be unmeaning and empty, unless it was fortified by adequate sources of revenue. Whatever value such an appeal may have in a judicial decision, I personally appreciate it, and I feel no doubt that the interpretation that I am placing on item 48 (List II) is sufficiently practical to leave an adequate source of revenue in the hands of the Provinces without making inroads on Central preserves. I may add here that the several authors I have been able to consult on this point agree in their opinion that, since the War, a tax on the sale of goods has proved to be both productive and practicable in many countries, under circumstances not very different from those prevailing in the Provinces of India. The yield naturally varies with the scope and rates of the tax, business conditions and administrative efficiency, but it is stated that the tax itself has become a major source of revenue in a number of countries, yielding more than the income-tax in a few instances and nearly as much as other sources of revenue in others.

For all these reasons I am of opinion that the tax levied by S. 3 of the Central Provinces Act falls within item 48 of List II and consequently the

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provisions of that Act which affect the taxation of motor spirit and lubricants manufactured or produced in India are *intra vires* the Central Provinces and Berar Legislature. The remaining provisions of the Act being incidental to the charging sections will also be valid.

In this view of the case, it is not necessary to deal with the contention of the Advocate-General of India under S. 297 (1) (*b*) of the Act. The contention becomes material only in the event of this Court holding that the tax is invalid in so far as it falls on commodities manufactured or produced in India. I confess, however, that I feel impressed with the argument of the Advocate-General of Madras that if it is found by this Court that the Central Provinces have no power to tax motor spirit manufactured or produced in India, then, they can only tax foreign motor spirit, and that since that is the only power which the Central Provinces will in that event possess, its exercise cannot amount to discrimination. No case of discrimination, he argued, can arise except where there is a power in the Legislature to tax *two* sets of goods, and it has deliberately exercised the power in favour of one in preference to the other. It was also argued that there must be an intention to discriminate, which cannot exist in a case where the Legislature has no power to tax one of the two sets of goods. These are all interesting questions, the solution of which is not without difficulty. But I do not wish to go into them on this occasion, because in my view of the case the question does not arise.

I am, therefore, of opinion that the Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938, is not *ultra vires* the Legislature of the Central Provinces and Berar and that the question referred to us should be answered accordingly.

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